

Symposium Articles and Essays

THE RECKLESS PURSUIT OF DOMINION: A SITUATIONAL ANALYSIS OF THE NBA AND DIMINISHING PLAYER AUTONOMY

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I. INTRODUCTION

This Article examines the recent experience of Eddy Curry, a National Basketball Association ("NBA") player whose employer, the Chicago Bulls, demanded that he take a Deoxyribonucleic Acid ("DNA") test ("DNA test" or "genetic examination") as a precondition of a new employment contract. Significantly, a professional athlete has never been required to take a DNA test, which reveals a person's genetic composition.¹ Curry experienced heart discomfort in March 2005, and though a group of cardiologists confirmed the structural soundness of his heart and diagnosed him with a benign "athlete's heart," the Bulls benched him for the remainder of the season.² The Bulls were influenced by the views of a dissenting cardiologist, who suggested that Curry may be afflicted with, or susceptible to developing hypertrophic cardiomyopathy ("HCM"), a serious yet remarkably rare condition that afflicts the heart.³ Although Curry

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1. See *infra* Part III.B.

2. Marlen Garcia, *Doc: No Need for DNA Test*, CHI. TRIB., Sept. 27, 2005, at C1 (citing conclusions of David Cannom, M.D., and Mark Estes, M.D.).

3. Bob Cohn, *Uncertainty Prevails on Sports DNA Tests*, WASH. TIMES, Oct. 11, 2005, at D1 (describing concern by Bulls about Curry's health condition); see also Wolfgang-M Franz et al., *Cardiomyopathies: From Genetics to the Prospect of Treatment*, 358 LANCET

passed a bevy of examinations that would have likely revealed the presence of HCM, the Bulls insisted upon a DNA test for a new contract. Curry refused, and was then traded to the New York Knickerbockers ("Knicks"), a team which did not require that he undergo a DNA test. The Knicks allowed Curry to instead re-take and pass a series of less invasive examinations, and then signed him to a six year, \$56 million contract.⁴ A starting player for the Knicks, Curry did not experience any heart-related problems in the 2005-06 NBA season.

The concept of a team-required DNA test raises numerous questions, some of which appears obvious: can an NBA team legally require a player to submit to a DNA test? Should a team be able to do so? Do normative principles of privacy and autonomy prove illuminating? More subtle questions also arise: can situational influences distort how teams, players, and fans evaluate required genetic testing? Are related cognitive biases and heuristics exploitable? Are teams, players, and fans more like situational characters or rational thinkers in how they assess required genetic testing? And perhaps most interestingly, how does required genetic testing fit into a grander system of relations between the NBA and its players, and what lessons can we learn from that system?

In attempting to answer these questions, this Article examines required genetic testing of NBA players from a situational vantage point, integrating socio-psychological, legal, and ethical analyses. The core argument may be expressed as follows: required genetic testing of NBA players appears consistent with a broader and largely deleterious agenda by the NBA to control players.⁵

Beginning with the implementation of the rookie wage scale in 1995 through the recent imposition of a paternalistic player dress code, the NBA

1627, 1627-1637 (2001) (providing extensive information on HCM); *infra* Part III.A-B.

4. See Marc J. Spears, *Curry Plays on Despite Questions*, DENVER POST, Nov. 18, 2005, at D01 (discussing Curry's contract with the New York Knicks).

5. I address this central thesis in this Article and also in previous and forthcoming publications: Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113 (2004) [hereinafter *Illegal Defense*] (revealing that players who bypass college for the NBA are the optimal group of NBA players, and that banning them would be legally and economically irrational), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=567745; Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOKLYN L. REV. 1501 (forthcoming, May 2006) [hereinafter *It's Not About the Money*] (positing influence of behavioral law and economics on contract negotiations between professional athletes and teams), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=822864; Michael A. McCann, Alan C. Milstein, & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. (forthcoming, May 2006) [hereinafter *Legality of Age Restrictions in the NBA and NFL*] (assessing legal, social, and ethical dynamics of age eligibility for employment in the NBA and NFL), available at <http://papers.ssrn.com/abstract=881710>.

has increasingly usurped player autonomy. The NBA's capacity to dictate its players' lives largely rests in its adroit manipulation of the fans and media. For instance, because of unappreciated cognitive biases, fans and media often embrace distorted views of players' maturity, arrest propensity, and collegiate experiences. As a result, NBA players tend to be wrongly identified as immature, out-of-control, and hopelessly uneducated. In turn, the NBA has designed policies that ostensibly remedy these purported "problems" while less detectably transferring autonomy from player to league. In short, the league sees that others often fail to see, and that enables it to surreptitiously control players.

The NBA's usurpation of player autonomy is uniquely troubling in the context of medical decision-making. Prevailing ethical principles dictate that medical care should empower patients, enhance their participation in treatment decisions,⁶ and preserve a right to refuse any form of treatment.⁷ For that reason, team-imposed genetic exams appear dissonant with broader conceptions of bodily autonomy and privacy rights.

Similarly, NBA teams may run afoul of social norms by requiring genetic or other invasive exams. This is particularly true since DNA test results reveal massive amounts of personal information that can be easily misused or misinterpreted.⁸ Along those lines, there exists the potential for significant stigmatic harm: given the inconsiderable population of NBA employers, the limited number of employment (roster) opportunities, and the very public nature of "NBA life," a player stigmatized by a genetic test may be unable to obtain NBA employment. Such a phenomenon appeared evident when Curry "enjoyed" free agent status in the summer of 2005, as an "HCM concern"—a concern disputed by a litany of examination results and the opinions of numerous cardiologists—which temporarily declassified a proven young talent into damaged goods.

The absence of collectively-bargained authority also proves salient: The NBA and the National Basketball Players' Association (NBPA), like other professional sports leagues and their players' associations, have yet to negotiate rules for genetic testing. Considering the ethical uneasiness and normative concerns of required genetic testing, a moratorium on it seems desirable until collectively-bargained procedure has been enacted. Though circumstances may undoubtedly call for a player to *consider* taking a DNA test, the decision to take the test should remain with the player. Yet akin to

6. See, e.g., Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 302 (1999) (discussing patient participation in treatment decisions).

7. See, e.g., Linda Edmondson, *Healthcare and the Law: A Good Death in Oklahoma*, 27 OKLA. CITY U.L. REV. 939, 942 (2002) (discussing the patient's right to refuse).

8. See generally Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 181-82 (2004) (explaining the amount of information revealed from DNA tests).

the NBA's other autonomy-arrogating machinations, such as the rookie wage scale, the 19-year old age floor for draft eligibility, and the new dress code, an NBA team has nevertheless demanded genetic testing in a setting of malleable social biases and inaccurate stereotypes.

Accordingly, team-required DNA testing appears emblematic of a continuous, obfuscated erosion of NBA player autonomy. This Article will explore the role of situational manipulation in this erosion and why usurpation of autonomy proves especially unsound in the setting of required genetic testing.

II. CONTROL AND THE NBA

Over the last decade, the NBA has utilized situational manipulation to reallocate relative rights between the league and its players. Exploring this development illuminates the regressing relationship between players and teams, while helping to explain why required genetic testing exemplifies a broader pattern of NBA behavior. This Article first canvasses the growth of the NBA and the eventual movement towards situation-compatible control.

A. *Father Knows Best: The Rookie Wage Scale*

The NBA was formed in 1949 after the Basketball Association of America and the National Basketball League merged.⁹ Over the next four decades, buoyed by the play of such spectacular players as Larry Bird and Michael Jordan, the league enjoyed bountiful growth. This growth could be measured by marked increases in ticket sales, merchandise sales, television and radio revenue, and also by a precipitous expansion of franchises.¹⁰

To ensure an equitable distribution of surging wealth, the NBA's players formed, in 1954, the National Basketball Players Association (NBPA), which would serve as their collective negotiating unit.¹¹ Over time, the NBPA would negotiate improved employment conditions and satisfactory apportionments of league revenue.¹² In 1983, the NBA and NBPA agreed to cap team payrolls ("salary cap"), but guaranteed that

9. McCann, *Illegal Defense*, *supra* note 5, at 117.

10. *Id.* at 117-18. The growth of the NBA followed a general popular swelling of sports revenue in the 1980s, and the advent of the modern sports industry. See PAUL WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 267-69 (2000) (observing the economic implications of sports fans passionately following their teams); Roger I. Abrams, *Torts and Sports: Legal Liability in Professional and Amateur Athletics*, 54 U. CIN. L. REV. 1237, 1238 (discussing the growth of the NBA).

11. See McCann, *Illegal Defense*, *supra* note 5, at 117.

12. *Id.*

players would receive between 53 percent and 57 percent of the NBA's gross revenues (i.e., gate receipts, local and national television and radio revenue and preseason and postseason revenue).¹³ Despite subsequent discord over formulaic aspects of gross revenues, the two negotiating units enjoyed a lucrative relationship over the next decade.¹⁴

In 1995, the NBA voiced concern over the increasing financial demands of amateur players selected in the first round of the NBA Draft ("NBA Draft" or "Draft").¹⁵ As a matter of background, the NBA Draft is the exclusive process by which amateur players gain entrance into the NBA. It consists of two rounds, with each team allocated one selection in each round. Draft order is largely determined by the inverse order of teams' records.¹⁶ Ostensibly designed to enable weaker NBA teams to select better amateur players, the Draft manifests a deliberate scheme to prevent amateur players from bargaining with multiple NBA teams. Once a team drafts an amateur player, he becomes the exclusive property of the team for at least one calendar year.¹⁷

To the dismay of NBA teams, players selected in the first round increasingly utilized the "hold out," or a refusal to report, as a bargaining tool in lieu of multiple-employer negotiations. Most famously, Glenn Robinson was selected first overall by the Milwaukee Bucks in the 1994 NBA Draft, sought a \$100 million contract, and refused to report until the Bucks capitulated and signed him to a 10-year, \$68 million contract—all before Robinson had played in his first NBA game.¹⁸ The 1994 draft generated a particularly high number of holdouts: Robinson (1st selection overall), Juwan Howard (5th), Carlos Rogers (11th), Khalid Reeves (12th), Eric Piatkowski (15th), and Clifford Rozier (16th).¹⁹

13. *Id.* at 118.

14. In 1991, the NBPA and the NBA debated whether the NBA could exclude from its calculation of gross revenues those proceeds that derived from luxury suite rentals, playoff ticket sales, and arena signage. By doing so, the NBA was able to maintain a salary cap number lower than would be required if those particular proceeds contributed to gross revenues. The parties ultimately settled their dispute. *Id.*

15. *Id.* at 118-19.

16. To dissuade non-playoff caliber teams from deliberately losing games in order to obtain the number overall pick, the NBA instituted a lottery system in 1984. Though it has evolved over the last 20 years, the lottery system is weighted, and affects only teams that do not make the playoffs. *Id.* at 129-32.

17. See Collective Bargaining Agreement, Jul. 29, 2005, NBA-NBPA, Art. (X)(4), available at http://nbpa.org/cba_articles/article-X.php (last visited Jan. 5, 2006) [hereinafter "2005 CBA"] (stipulating that amateur NBA players are the property of the NBA for one calendar year).

18. Richard Justice, *Webber Hits the Jackpot*, WASH. POST, Oct. 11, 1995, at F1.

19. Tom D'Angelo, *Ex-Suncoast Star Rellford Gets a Shot in Dallas*, PALM BEACH POST, Oct. 16, 1994, at 15C (noting holdouts of Rogers, Piatkowski, and Rozier); Dave George, *Rookie Reeves Better Shape Up; Heat Need a Leader On Point*, PALM BEACH POST, Oct. 13, 1994, at 1C (noting holdout of Reeves); Burt Graeff, *Hill Leads Cavs to Comeback*

In response, a number of NBA personnel criticized “young players” through sweeping generalizations. These generalizations focused on perceived avarice and irresponsibility. For instance, Phoenix Suns executive, Cotton Fitzsimmons, remarked, “We need to make young players feel an obligation to the game, to pay some dues.”²⁰

Some in the media echoed these concerns. Columnist Bruce Jenkins of the *San Francisco Chronicle* bemoaned, “[T]he league has a serious problem on its hands. Rookie salaries are not only out of control, they threaten the league's stability and integrity.”²¹ Similarly, Dave Lagarde of the *New Orleans Times-Picayune* complained, “They also are spoiled, pampered, disruptive and egotistical to a fault. And those are some of their more alluring traits. They sulk. They whine. They demand playing time. They miss practice or shoot-arounds before games. They call news conferences to refute coaches' claims that they are immature.”²² Animated by these and other concerns while negotiating a new collective bargaining agreement (“CBA”) with the NBPA, the NBA locked out the players following the 1995 NBA Finals.²³

After a four-month lockout, the NBA and NBPA agreed to a new CBA (“1995 CBA”), and it contained a rookie wage scale: players selected in the first round could only sign three-year contracts worth a pre-determined amount, ranging from \$1.5 million for the last pick in the first round to \$8.5 million for the first pick.²⁴ In other words, rookies could no longer negotiate their earnings over their first three seasons, and thus the earning power of top draft picks would plummet. Not surprisingly, existing NBA players readily agreed to the rookie wage scale as a collectively-bargained “trade-off”: veteran players would now receive larger portions of their teams' salary caps.²⁵ Indeed, since players not yet in the NBA (or

Victory, PLAIN DEALER, Nov. 16, 1994, at 1D (noting holdout of Howard).

20. Alexander Wolff & Richard O'Brien, *Apprentice Wages*, SPORTS ILLUSTRATED, Feb. 20, 1995, at 13.

21. Bruce Jenkins, *Absurd Rookie Salaries – NBA Needs To Reward Performance Not Promise*, S. F. CHRON. Oct. 13, 1994, at B1.

22. Dave Lagarde, *Behavior of NBA's Brat Pack is a Whine of the Times*, TIMES-PICAYUNE, Feb. 16, 1995, at D1.

23. McCann, *Illegal Defense*, *supra* note 6, at 118 and accompanying notes.

24. See *Inside the Deal*, TORONTO SUN, Sept. 13, 1995, at 94 (noting the salary for the first overall pick); Ira Winderman, *What to do with Bonus Draft Pick? Stern Can Reward Team of His Choice*, SUN-SENTINEL, Sept. 1, 1996, at 16C (noting the salary for last pick in the first round). The precise salary of each draft position was calculated by using a weighted average of the rookie salaries received by the same pick during the previous seven drafts. See McCann, *Illegal Defense*, *supra* note 5, at 119-20 and accompanying notes (discussing rookie salaries).

25. See generally Larry Coon, *NBA Salary Cap/Collective Bargaining Agreement FAQ*, at <http://members.cox.net/lmcoon/salarycap.htm> (last visited May 7, 2006) (describing the ways in which team salary caps and rookie wage scales work).

any professional sports league) have no “seat at the bargaining table,” their interests are often not represented in collective bargaining agreements.

The 1999 CBA expanded the rookie wage scale, and this modified version remains in effect today.²⁶ Specifically, contracts for first round draft picks were extended to three years with a team option for a fourth year, and at the conclusion of the fourth year, those players may become “restricted free agents,” meaning they may only sign with another team if the player’s original team does not match the contract and keep the player.²⁷ Only at the conclusion of their fifth season are players drafted in the first round assured of the opportunity to become unrestricted free agents, at which point they may sign with any team.

On one hand, the rookie wage scale has proven strikingly effective: Since its implementation, there has not been one draft-pick holdout.²⁸ Moreover, and quite obviously, rookie NBA players still earn considerably high salaries when compared to the general population; \$1.5 million for three years would likely satisfy most people’s needs and wants, although many of us would still prefer to choose our employers and location of employment—choices unavailable to rookie players.

On the other hand, the rookie wage scale is in many ways emblematic of diminished autonomy of NBA players. Consider that the average NBA career lasts only four to five years, and that teams may prevent their top draft picks from becoming unrestricted free agents until after their fifth season.²⁹ In other words, the average NBA career is restricted by a pre-determined contract, which is likely of diminished value, and one that teams may unilaterally extend from three seasons to five seasons. Put differently, that player may never have the opportunity to negotiate a salary or play for another team unless the drafting team opts not to extend his contract or match another team’s contract offer. The choice remains with the drafting team.

The 1999 CBA featured another limitation on player autonomy: maximum salaries. For the first time, individual salaries were capped according to NBA service time.³⁰ Though such caps were pegged at unquestionably high figures – from approximately \$10 million to \$15

26. McCann, *Illegal Defense*, *supra* note 5, at 125-26 and accompanying notes.

27. *Id.* at 120.

28. John DeShazier, *NFL Needs to Rein in Rookies*, TIMES-PICAYUNE (New Orleans), Aug. 1, 1998, at D1 (noting that the rookie salary cap “effectively eliminated holdouts”).

29. Arn Tellem, *NBA’s Plan to Limit Youngsters No More than Hollow Altruism*, N.Y. TIMES, May 13, 2001, at 8, 11; *see also* Athlelia Knight, *Pursuing a Career at a Young Age*, WASH. POST, Jun. 27, 1995, at C1 (asserting that average NBA career lasts four to four-and-a-half seasons); Mark Montieth, *NBA Rookies Required to Get with Program: Classes Are All About Making Players Aware of Lifestyle Traps*, INDIANAPOLIS STAR, Oct. 5, 2003, at 1C (identifying the average NBA career as lasting four seasons).

30. McCann, *Illegal Defense*, *supra* note 5, at 122-23 and accompanying notes.

million in annual salary – they further evidenced the NBA’s effort to curtail self-determination among players. Of course, both the rookie wage scale and maximum salaries were products of collective-bargaining, meaning that they purportedly reflected a consensus of the players.³¹ Yet only those *without* a seat at the bargaining table were adversely affected by the rookie wage scale, and acquiescence to a maximum salary provision arose only after a league-imposed lock out.

Despite reflecting unequal bargaining power for all NBA players and an absence of any bargaining power for those players not yet in the NBA, collectively-bargained rules tend to receive automatic, almost reflexive endorsement by courts and much of the public.³² In essence, we tend to automatically conclude that if it was collectively-bargained, then it must represent the free will of the parties, so we should investigate no further. This opinion appears characteristic of the fundamental attribution error, a term used by psychologists to describe the tendency of humans to “look at any setting and make casual attributions [so that] certain key features of that setting – the observable actions of individuals – exert disproportionate influence over their evaluations.”³³ Put more simply, we tend to focus on the easiest, most readily-understandable aspects of any relationship, such as two parties in negotiation and how they ultimately divide rights and obligations, while ignoring the more nuanced and less-observable aspects, such as the absence of certain parties in the negotiation and the situational pressures on all parties. For that reason, we prefer to see relationships as between dispositional or “rational” actors rather than between situational characters, even when this preference is uncorroborated.³⁴

The fundamental attribution error may explain why collectively-bargained outcomes, which *seem* like decidedly explicit manifestations of the human disposition, enjoy broad deference, while we tend to miss that

31. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 299 (1995) (noting that “the actions a union undertakes must reflect the consensus of its members”).

32. See, e.g. *W.R. Grace & Co. v. Int’l Union of the United Rubber, Cork, Linoleum and Plastic Workers, Local 759*, 461 U.S. 757, 771 (1983) (describing public policy of honoring collective bargaining agreements); *Bechtel Const., Inc. v. United Broth. of Carpenters*, 812 F.2d 1220, 1224 (9th Cir. 1987) (highlighting the “supreme value of negotiation” in the collective bargaining process).

33. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 177 (2003) (describing tendency of the public to draw automatic conclusions); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1565-66 (2005) (analyzing fundamental attribution error in context of race relations); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Preemptory Challenge*, 85 B.U. L. REV. 155, 225-26 (describing “robust tendency” of humans to “overattribute” the behavior of others to fixed characteristics).

34. Hanson & Yosifon, *supra* note 33, at 136-37.

certain parties who are not involved in the bargaining may be more affected than any party to the bargaining. Indeed, premier amateur players, and particularly those on the cusp of entering the NBA, appear to have as much at stake in collectively-bargained rules for future players as do any existing NBA players.

Along those lines, the fundamental attribution error may explain why we tend to overlook the situational influences on existing NBA players during collective-bargaining. Indeed, locked-out NBA players endure intense pressure to capitulate to league demands, particularly given the absence of viably-alternative basketball leagues. That is, the situation they encounter may distort their decision-making in ways that yield undesired “choices.” Nevertheless, because of the fundamental attribution error, external observers may be more affected by the simplicity of collectively-bargained rules than by either their instrumental components or consequential effects. As a result, the NBA enjoys wide latitude in asserting control over players, and in ways unappreciated by external observers.

B. Father Knows Best (Part II): The NBA Dress Code

More recent actions by the NBA further evince its attempt to control players through situational manipulation. The NBA’s new “dress code” perhaps most vividly evidences this dynamic. In September 2005, the NBA announced that players would be required to wear “Business Casual” attire whenever they are engaged in team or league business, including when traveling on team flights and partaking in team dinners.³⁵ As defined by the NBA, “Business Casual” expressly prohibits the use of such commonplace items as headphones and medallions.³⁶ It also disallows chains and jeans or denim products.³⁷ Commissioner David Stern rationalized the dress code on the need for players to recognize “different uniforms for different occasions,” and that they conform to NBA-determined norms for player expressions.³⁸

A number of NBA players have characterized the dress code as “racist” and emblematic of the NBA’s increasing control over player autonomy and human expression.³⁹ Perhaps bolstering this sentiment are recent NBA endorsement and licensing agreements that appear to celebrate

35. *NBA Player Dress Code*, available at http://www.nba.com/news/player_dress_code_051017.html (last visited Jan. 5, 2006).

36. *Id.*

37. *Id.*

38. Filip Bondy, *A Dressing Down Would Suit Stern*, N. Y. DAILY NEWS, Oct. 20, 2005, at 66.

39. Chris Perkins, *Reaction to Dress Code Mixed*, PALM BEACH POST, Oct. 22, 2005, at 2B (citing remarks by Gary Payton and Stephen Jackson).

the very lifestyle norms prohibited by the dress code. Consider the league's decision to hire British comedian Sacha Cohen (a.k.a. "Ali G") to promote the NBA in television commercials.⁴⁰ In the commercials, Cohen is dressed in a tracksuit accessorized by a large, bulky chain, while donning a skullcap and wraparound sunglasses. In other words, his attire expresses the very same "street" or "hip-hop" culture prohibited by the dress code.

Similarly, the league has licensed a videogame called "NBA Ballers," which pitches itself as "the exclusive one-on-one basketball videogame highlighting the 'bling-bling' lifestyle of NBA superstars."⁴¹ In the game, players take on the identity of actual NBA stars and accumulate "[m]ansions, cars, jewelry, women -- if you've spotted it on 'MTV Cribs,' you're going to see it here."⁴²

Lastly, consider that 29 of the 30 NBA teams employ cheerleaders and/or dance teams comprised of young, very attractive women wearing highly-revealing clothing and performing seductive dances or movements during intermissions and time-outs.⁴³ Some of the names of the dance teams only further the obvious: "Lakers Girls," "Warriors Girls," "Cavaliers Girls," and "Chicago Luvabulls" are among them.⁴⁴ One might wonder about the arguably demeaning depiction of women being conveyed, and why the NBA would express concern about the impression transmitted by the clothing of players sitting at the end of the bench, off-camera, while it simultaneously generates profits from scantily-clad young women performing risqué dance routines on center court.

This contradictory treatment has drawn the ire of NBA coaches. For instance, San Antonio Spurs coach Gregg Popovich remarks, "on one hand, you're endorsing the culture, and on the other hand, you're trying to block the culture. It sounds almost duplicitous."⁴⁵ The speciousness described by

40. Peter May, *Polishing Reputation is a Fashionable Trend*, BOSTON GLOBE, Nov. 1, 2005, at E1.

41. Hoopsvibe.com, *NBA Videogames: NBA Ballers*, http://www.hoopsvibe.com/nba_video_games/nba_ballers-ar12627.html (last visited Jan. 5, 2006); see also *NBA Ballers Phenom.*, <http://www.nbaballers.com/> (last visited Jan. 5, 2006) (providing additional information on the videogame).

42. Tom Ham, *NBA Ballers*, WASH. POST, Apr. 25, 2004, at F09.

43. Only the Boston Celtics do not employ either cheerleaders or dance teams. Lawrence S. Connor, *Sit down at Red's Table and Feast on Basketball Tales*, INDIANAPOLIS STAR, Nov. 27, 2004, at 15A.

44. For more on these dance teams, visit their official websites, which include numerous photos of these women, as well as opportunities to buy swimsuit calendars: http://www.nba.com/cavaliers/dance/cavalier_girls_home.html (Cavalier Girls) (last visited Jan. 28, 2006); <http://www.nba.com/bulls/dance/luvabulls.html> (Chicago Luvabulls) (last visited Jan. 28, 2006); http://www.nba.com/lakers/dance/200203_lakergirls.html (Laker Girls) (last visited Jan. 28, 2006); http://www.nba.com/warriors/dance/Warrior_Girls_200506.html (Warriors Girls) (last visited Jan. 28, 2006).

45. May, *supra* note 40.

Popovich may reflect a broader effort by the NBA to control its players and enhance the league's decision-making authority. Indeed, when the league exercises its authority, it celebrates "bling-bling"; when the players exercise their autonomy, the league castigates "bling-bling."

Nevertheless, the dress code has attracted significant social support, particularly in emphasizing paternalism. *Denver Post* Columnist Cindy Rodriguez, for instance, reasons, "What the dress code is really about is making some of these players who dress like boys look like men."⁴⁶ Even a survey of readers of the youth-oriented *Inside Hoops* finds that 51 percent support the dress code.⁴⁷ Such reflections appear consistent with views expressed in recent public opinion polls and in NBA focus groups: NBA players are the least popular athletes among the major professional sports leagues.⁴⁸ Indeed, some fans appear uncomfortable with the hip-hop culture prevalent in the NBA, as they automatically and erroneously associate that culture with gangs, violence, truancy, and other nefarious dynamics.⁴⁹

The public sentiment in favor of the dress code appears harmonious with social-psychological findings on how humans interact and determine choices. Most salient may be the heuristic of availability, which leads us "to evaluate the frequency or likelihood of an event on the basis of how quickly instances or associations come to mind."⁵⁰ In other words, images that are easily imagined and particularly vivid tend to enjoy heightened salience in our decision-making and opinion-making.⁵¹ For that reason,

46. Cindy Rodriguez, *Will NBA's Dress Code Filter Down to the Street?*, DENVER POST, Nov. 3, 2005, at F01.

47. *Inside Hoops Survey: Do You Support the Dress Code?*, <http://www.insidehoops.com/polls.shtml> (poll ended Oct. 27, 2005).

48. Mike Wise, *Opinions on the NBA's Dress Code are Far from Uniform*, WASH. POST, Oct. 23, 2005, at A01 (citing anonymous NBA sources). Note, of course, that popularity among players changes over time, and that perhaps the relatively unpopularity of NBA players will prove ephemeral. For instance, Major League Baseball players, as a group, were unpopular in the mid-1990s, and that was largely the result of the Baseball Strike of 1994. See Mike Fish, *When Strike is Over, Game Faces Selling Job*, ATLANTA J.-CONST., Sept. 17, 1994, at D7 (discussing how to get back the popularity of baseball players).

49. Wise, *supra* note 48; see also Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004) (describing the influence of hip-hop culture on the law); Paul Riede & Maureen Sieh, *Hip-Hop Summit Aims to Keep Students in School*, NEWHOUSE NEWS SERV., Oct. 16, 2003 (citing remarks from Beverly Brooks-Mitchell, executive director of the Urban League of Dallas).

50. SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 384 (2nd ed. 1991). But see W. Kip Viscusi, *Individual Rationality, Hazard Warnings, And The Foundations of Tort Law*, 48 RUTGERS L. REV. 625, 634 n.17 (1996) (noting limitations of the availability heuristic in certain hazard settings).

51. Hanson & Yosifon, *supra* note 33, at 39-40; see also Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMPLE L. REV. 1, 20 (2003) (describing significance of "vividness" in effect on decision-making and

humans tend to regard risks as more serious and more likely when an incident is readily called to mind (e.g., dying in a plane crash) and, conversely, why they tend to regard risks as less serious and less likely when they are gradual or are presumed subsequently-modifiable (e.g., developing cancer from smoking).⁵²

Availability reveals why we often use appearance as a proxy for other persons' characteristics or traits (e.g., work ethic, ambition, law-abidingness), even when those characteristics and traits have nothing to do with appearance: We conceptualize a certain persona, say, a "hard-working" person, as resembling an unmistakable physical archetype—someone who is "clean-cut" and "well-dressed," and that image animates how we regard and treat others.⁵³ Troublingly, and as with other cognitive biases and heuristics, we often fail to appreciate the effect of availability on our thinking.⁵⁴ Perhaps that is why "casual" or "non-conformist" attire irks many persons, but why those same persons cannot express *why* they are irked. In other words, public advocacy for "proper attire" may better reflect cognitive distortions and simplified-thinking than anything about "poorly-dressed" persons.

In our setting, the well-publicized legal troubles of prominent hip-hop artists like Tupac Shakur, the Notorious B.I.G., and Curtis "50 Cent" Jackson have stigmatized hip-hop culture, including music, clothing, and other cultural manifestations, as crime-inducing, even though the vast majority of hip-hop artists appear to be law-abiding. Indeed, notes Professor Eric Freedman, the comparatively few, but infamous arrests of hip-hop artists "have heightened concerns that some of these performers, particularly the stars of gangster rap, have become dangerous emblems for an immensely popular, primarily black musical genre that celebrates violence, gangs, guns, and sexual conquest."⁵⁵ As a result, hip-hop's

opinion-making).

52. Hanson & Yosifon, *supra* note 33, at 39-40; see also Richard M. Hynes, *Overoptimism and Overborrowing*, 2004 BYU L. REV. 127, 156 (2004) (assessing application of availability heuristic to micro-economic decision-making).

53. See, e.g., Simon Howard, *Looks Count When There's A Job to Dye For*, SUNDAY TIMES (LONDON), Jan. 27, 2002, at 8 (commenting on why business executives dye their hair as a way of meeting social expectations for their image); Bill Leonard, *Casual Dress Policies can Trip Up Job Applicants*, HR MAG., Jun. 1, 2001, at 33 (describing how job applicants must satisfy preconceived notions of "proper appearance" in order to obtain employment).

54. See generally Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 109 (using social psychology to explain different perspectives by different categories of lawyers in perceiving a problem); McCann, *It's Not About the Money*, *supra* note 5, at 1518-19 (discussing the tendency of individuals to fail to recognize and utilize heuristics).

55. Eric M. Freedman, *A Lot More Comes into Focus when you Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the*

unique popularity among many NBA players, who likewise tend to be African-American,⁵⁶ may mislead fans into associating those players with crime, or propensity to crime. Such an inference only amplifies in believability when two prominent NBA players (Allen Iverson and Ron Artest) engage in hip-hop careers and then, for completely unrelated reasons, are charged with crimes.⁵⁷

To make matters worse, the anchoring and adjustment heuristic impairs our capacity to adjust sufficiently from initial conclusions.⁵⁸ That is, once we form an opinion, we tend to anchor it and fail to adjust for new information.⁵⁹ It is why, for instance, the opening offer in a negotiation often proves so critical.⁶⁰ This is particularly apparent in professional sports negotiations, as athletes and teams often anchor to their original expectations of a "fair offer."⁶¹ Consequently, when NBA fans associate hip-hop with crime, they often associate NBA players' hip-hop predilections as evidence of their interest in crime, even when presented with contrary data. Not surprisingly then, the NBA has manipulated this "situation" to exercise

Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words and Group Libel within the First Amendment, 81 IOWA L. REV. 883, 957 n.365 (1996) (citing a 1993 New York Times article discussing the impact of gangsta rap); see also Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 376 (2005) (noting astutely, "[o]ften rap artists walk the line with tough music and tough names, like 'C-Murder.' What we as a society imbedded with stereotypes must remember, however, is that 'image' does not translate into 'guilt' when crime occurs.").

56. Seventy-eight percent of NBA players are African-American. Lori Shontz, *A Jazzy Feel*, ST. LOUIS POST-DISPATCH, Feb. 20, 2005, at D01.

57. See Charles Elmore, *An Image Problem*, PALM BEACH POST, Nov. 28, 2004, at 1B (discussing Ron Artest's music career); Eugene Kane, *Role Models: Image Isn't The Whole Story*, MILWAUKEE J. SENT., May 27, 2001, at 01B (discussing Allen Iverson's music career).

58. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) (discussing the differences people have in separating the final conclusion they make from the initial perception of a problem).

59. See Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. DISP. RESOL. 1, 11-13, 18-19 (1994) (discussing reasons why negotiations fail even when entered into to avoid trials). Anchoring and adjustment has also been illustrated by utilizing different reference points in questioning. See, e.g., Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 122-23 (1981) (illustrating how individuals' estimation of the likelihood of corporate fraud varies significantly based on the phrasing of the question). It has proved similarly influential in the context of underwriting. See, e.g., Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 613 (2004) (discussing the anchoring and adjustment heuristic as applied to the initial offering of securities).

60. Korobkin & Guthrie, *supra* note 59, at 11-13, 18-19.

61. See McCann, *It's Not About the Money*, *supra* note 5.

greater control on NBA players, while simultaneously exploiting it for profit.

C. *Father Knows Best (Part III): The Elevated Age Floor for NBA Draft Entry*

Perhaps the most controversial reflection of the NBA's desire to control players rests on its elevated "age floor" for draft eligibility. As part of a new CBA consummated in July 2005 ("2005 CBA"), the two negotiating units raised the age floor for draft entry from 18 to at least 19 years of age, effective in the 2006 NBA Draft.⁶² Consequently, amateur players can no longer "jump" from high school to the NBA ("prep-to-pro players"); instead, they must wait one year, with the expectation that those players will attend college for one season.

From 1949 to 1994, only two players had jumped from high school straight to the NBA.⁶³ Such eccentricity ended in 1995, when high school prodigy Kevin Garnett declared for the NBA Draft. His decision and subsequent on-court success sparked a new, albeit cautious trend of prep-to-pro players. Specifically, thirty-six amateur players straight out of high school were eligible to be selected from 1995 to 2004, or, on average, less than four players per year.⁶⁴ With rumors of an impending age floor, an additional eleven such players declared and were eligible in the 2005 NBA Draft.⁶⁵ Absent a successful legal challenge, the elevated age floor will prevent future amateur players from exercising this choice.

Paternalism and predictability comprise the principal rationales for the elevated age floor. League officials routinely express that amateur players require the "life experience" bestowed in college in order to handle the pressures of NBA life, and that NBA teams can better evaluate amateur

62. More precisely, an amateur player must be at least 19 years of age during the calendar year in which the Draft is held and at least one NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school). CBA Articles, art. X §1(b)(i) (2005), available at http://nbpa.org/cba_articles/article-X.php (last visited Feb. 22, 2006).

63. The only two players to jump were Daryl Dawkins and Bill Willoughy. Note that Moses Malone did not participate in the NBA Draft, as he only participated in the draft for a rival league, the American Basketball Association. See McCann, *Illegal Defense*, supra note 5, at 144-146, n.93 (discussing the rise of "prep-to-pro" players in the 1990s).

64. See Posting of Michael McCann to Yoco sports weblog, (Jul. 20, 2004, 05:31 EST), <http://www.yocohoops.com/story/2004/07/20/133103/56> (discussing thoughts on the ban of high school players from the NBA draft from an economic perspective).

65. See Insidehoops.com, *NBA Draft Early Entry List*, Jun. 22, 2005, <http://www.insidehoops.com/nba-draft-early-entry.shtml> (listing American and international players who declared for the 2005 NBA draft).

66. Stephen F. Holder, *Better With Age?*, MIAMI HERALD, May 4, 2003, at 1C.

talent after it has been vetted in the college game.⁶⁶ Less diagrammatic may be the self-interest of existing NBA players to prevent superior amateur talent from usurping their employment opportunities, even though the NBPA's stated objection to the elevated age floor suggests otherwise.⁶⁷ In other words, the elevated age floor primarily reflects the NBA's desire to limit player autonomy, be it on grounds of emotional maturity or physical development. This point warrants particular attention, as it may further illuminate the relationship between the Bulls' DNA request of Curry and a broader pattern of NBA behavior.

NBA officials frequently claim that prep-to-pro players lack the requisite maturity to manage NBA life, and thus would benefit from the "life experience" supposedly gained in college. NBA Commissioner David Stern has repeatedly enunciated this rationale. In 2001, he stated, "[i]f these kids have the ability to get a little more maturity, a little more coaching, a little bit more life experience overall, that's good."⁶⁸ Similarly, in 2005, Stern opined that amateur players need "year of experience, a year of life experience"⁶⁹ and that an elevated age floor would, "allow kids another reason to have another year or two to grow, to deal with the stress, the discipline and, really, the life experience that would be helpful."⁷⁰

The life experience rationale is premised on a widely-shared belief that young NBA players are especially susceptible to nefarious influences, irresponsibility, and a propensity to "get in trouble." Consider the uproar when Garnett declared for the 1995 NBA Draft. *Chicago Sun-Times* columnist Jay Mariotti lamented,

It is such a fragile proposition – the thought someone could enter the NBA so young, no matter how gifted and tall and extraordinarily athletic, and be better off in the long term. The years after high school are perhaps the most crucial in human development, particularly for a basketball phenom, who should grow socially and scholastically in college⁷¹

Similarly, then University of Utah coach Rick Majerus bemoaned, "Emotionally, socially, physically, [Kevin Garnett] will be immature relative to the guys he will be around. In terms of how he relates to fans,

67. See, e.g., *Id.* (describing influence of selfish incentives among veteran NBA players on collective bargaining negotiations in supporting the NBA age restriction).

68. Michael Murphy, *Going Straight from High School to the Pros was Once Unheard of, but the Success of Players like Kobe Bryant and Kevin Garnett has More and More Teens Trying to Make the Leap*, HOUS. CHRON., Jun. 24, 2001, at 17.

69. Mark Berman, *Face to Face with NBA Boss*, ROANOKE TIMES, Jul. 6, 2005, at C4.

70. Michael Lee, *Commissioner Weighs in on Brown's Suspension*, WASH. POST, May 11, 2005, at D09.

71. Jay Mariotti, *Does Garnett Have Any Idea of What He's Getting Into?*, CHI. SUN-TIMES, Jun. 20, 1995, at Sports 87.

how he relates to girls, how he relates to having all that money. There's nothing good about this."⁷²

Such a viewpoint remains prevalent today. Jerry Dunn, former head coach of the Penn State men's basketball team, contends that prep-to-pro players "completely [skip] a part of their lives they can never get back They're skipping the basic foundation they need to take care of themselves and their families for the rest of their lives."⁷³ Likewise, NBA coach Terry Porter coach finds "[t]he big thing for us is [prep-to-players are] not quite as mature mentally."⁷⁴ Consonantly, David Jones of FLORIDA TODAY writes that "[l]eague rosters are filled with more and more . . . immature [players]."⁷⁵ These "immature players"—so the story goes—are "not ready for the pressures, challenges and temptations of life in the NBA [and] can make poor decisions that reflect badly on the league and hurt its bottom line."⁷⁶

This sentiment might prove convincing if it were not wholly untrue. Unbeknownst to most NBA fans and league observers, prep-to-players appear to be the *best* behaved group of American players in the NBA. In fact, according to a study of recently arrested NBA players, NBA players who attended college for four years represent a disproportionately *high* percentage of arrested NBA players, while those who did not attend college represent a disproportionately *low* percentage.⁷⁷ In regards to American players, while 41 percent of NBA players attended four years of college, 57 percent of arrested NBA players attended four years of college. In striking contrast, while 8 percent of NBA players did not attend college, only 5 percent of arrested NBA players did not attend college.⁷⁸ Indeed, while some of the NBA's most notorious players attended college for four years (e.g., Latrell Sprewell, Ruben Patterson, Damon Stoudamire),⁷⁹ prep-to-pro

72. Barry Temkin, *Garnett to Gain Riches, Lose Youth*, CHI. TRIB., Jun. 27, 1995, at Sports 1.

73. Phil Axelrod, *What's the Rush? Coaches Concerned Agents Are Swaying Too Many Youths*, PITTSBURGH POST-GAZETTE, Jun. 26, 1996, at D-6.

74. Benjamin Hochman, *NBA Draft is Still Getting Younger*, TIMES-PICTAYUNE, Jun. 20, 2004, at Sports 1.

75. David Jones, *NBA Draft Was Eye-Opener for SEC*, FLA. TODAY, Oct. 27, 2005, at 1D.

76. Michael Cunningham, *The Fountain of Youth*, S. FLA. SUN-SENTINEL, Mar. 10, 2005, at 1C (paraphrasing David Stern).

77. Posting of Michael A. McCann to Sports Law Blog, *Arrested NBA Players: Education, Age, and Experience* (Jul. 20, 2005, 07:10AM), http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html (examining player arrests over the last 15 years); see also Dwight Jaynes, *Stern Has it Exactly Backward on College*, PORTLAND TRIB., Aug. 8, 2005, available at <http://www.portlandtribune.com/archview.cgi?id=31127> (discussing the study of player arrests).

78. *Id.*

79. *Id.*

players have been consistently praised for their community service and social contributions.⁸⁰

The unexpectedly positive behavior of prep-to-pro players relative to college-educated players invites inquiry as to the real “life experience” that a premier high school basketball player can expect in college. For one, consider that the average National Collegiate Athletic Association (“NCAA”) Division I college player spends 40-50 hours a week practicing, lifting weights, attending team meetings, traveling, and playing games.⁸¹ In contrast, colleges and universities often prohibit students from employment in excess of 20-25 hours per week.⁸² For that reason, the “life experience” in college appears inclusive of two vastly different experiences: one for students who may engage in part-time employment, the other for student-athletes who must engage in full-time and unpaid labor.

Also consider the nefarious norms that are prevalent in many top college programs. Put bluntly, Division I athletes who commit serious crimes are often afforded “second chances” that members of the general student population do not enjoy.⁸³ Namely, schools are more likely to apply harsher penalties—such as suspensions and expulsions—on non-athlete students for partaking in the same deleterious activities as student athletes.⁸⁴ Some observers describe this environment as one of “special leniency.”⁸⁵

Significantly, psychological studies intimate that freshmen athletes may become more likely to engage in criminal activity when they observe their “veteran” 20- and 21-year old teammates break the laws, or even

80. See, e.g., *Nathan: Pro-Basketball-Player Hopeful Says He Has “Plan B,”* (NBC 5 News television broadcast Sept. 4, 2002), available at <http://www.nbc5.com/wednesdayschild/1648700/detail.html> (describing praise for Tyson Chandler and Eddy Curry due to their work with underprivileged children in Chicago); Pacers.com, *All-Star Reading Team Visits Schools*, Feb. 28, 2003, http://www.nba.com/pacers/community/reading_timeouts.html (praising Al Harrington for his active participation in the Pacers All-Star Reading Team, where Pacers players visit elementary schools and read stories to students).

81. Michael Wilbon, *Graduation Rates Deceive*, WASH. POST., Mar. 28, 2002, at D1 (explaining that graduation rates don’t account for many other factors, including those that come very close to graduating).

82. See, e.g., DePaul University, *Frequently Asked Questions about Student Employment*, available at http://careercenter.depaul.edu/fac_staff/hire/faqs.aspx (last visited Jan. 5, 2005) (showing that undergraduate students at DePaul University may work a maximum of 25 hours per week); Georgetown University, *General Information for Students*, available at <https://seo.georgetown.edu/content/files/GenInfo05.pdf> (last visited Jan. 5, 2005) (showing that undergraduate students at Georgetown University may only work a maximum of 20 hours per week).

83. Rick Maese, *Justice for All?*, ORLANDO SENTINEL, July 31, 2005, at C8 (discussing the “forgiving nature of college football”).

84. *Id.*

85. *Id.*

school rules, and fail to suffer material consequence. Indeed, humans tend to imitate behavior, especially that of groups.⁸⁶ Psychologists sometimes call this the “herd instinct,”⁸⁷ and perhaps in this context we can call it the “negative big brother” effect. Clinical data supports this intuition. According to a recent study in the *Clinical Journal of Sports Medicine*, college athletes are at far greater risk for maladaptive lifestyle and health-risk behaviors than are their non-athletic peers.⁸⁸ Specifically, they demonstrate “significantly more high-risk lifestyle behaviors” in the following areas: frequency of physical fights; number of sexual partners; frequency of unsafe sexual practices; use of anabolic steroids; excessive use of alcohol; use of smokeless tobacco; and frequency of engagement in unsafe transportation (e.g., failing to wear a helmet while riding on a motorcycle or moped; accepting rides in cars driven by those under the influence of alcohol or drugs).⁸⁹

Aside from sometimes dubious role-models, Division I college basketball players also appear to obtain the “life experience” of beguilement. Namely, Division I colleges, as well as the conferences in which they play, receive enormous revenue from the television broadcasting of their men’s basketball games.⁹⁰ Merchandise sales, such as replica uniforms with player numbers and licensing agreements, such as those with videogame companies, likewise provide substantial revenue.⁹¹ Such exposure may supply colleges with indirect, though highly valuable benefits, including increased student applications and alumni donations.⁹²

86. See, e.g., Paolo Ricciardelli, *My Eyes Want to Look Where Your Eyes are Looking*, 13 NEUROREPORT 2259-64 (2002) (describing behavioral tendency to look at what other people are looking at).

87. Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV., 527, 565 n.131 (describing herd instinct in context of market behavior); see also John H. Garvey, *Religion and the Public Schools after Lee v. Weisman: Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 768 (1993) (discussing the pressure exerted on students to participate in group prayer).

88. A. Nattiv et al., *Lifestyles and Health Risks of Collegiate Athletes: A Multi-Center Study*, 7 CLIN. J. SPORT MED. 262 (1997).

89. *Id.* at 266

90. For example, CBS entered into an 11-year, \$6 billion contract with the NCAA and its member schools to broadcast basketball games. See Mike Knobler, *The Mass Exodus*, ATLANTA J. & CONST., Nov. 16, 2003, at Q1 (discussing the “mad to dash to the NBA” and its implications).

91. See, e.g., Jeff Berman, *GameStop Upbeat on 2nd Half Despite Continuing PS2 Shortages*, CONSUMER ELECTRONICS DAILY, Aug. 18, 2004 (discussing revenue generated by NCAA-licensed videogames); Jeff Matthews, *UGa-liness is Hardly a Surprise*, ALEXANDRIA DAILY TOWN TALK, May 17, 2003, at 15B (providing repeated examples of NCAA profiting off NCAA student-athletes, while denying the opportunity of those athletes to seek self-profit); Wallace Matthews, *NCAA Cereal Killers: Goons with Spoons*, N.Y. POST, Feb. 28, 1998, at 98 (describing detail on the dubious business practices of the NCAA).

92. McCann, *Illegal Defense*, *supra* note 5, at 191-92.

Individual coaches may also profit through secure, considerable coaching and endorsement contracts.⁹³ Despite generating the product from which all of the aforementioned parties gain, college basketball players are prohibited by the NCAA from receiving any portion of the revenue they generate.⁹⁴ In denying these players the fruits of their labor, the NCAA sardonically reasons that “student-athletes should be protected from exploitation by professional and commercial enterprises.”⁹⁵

College basketball players may also suffer the effects of continuous, untoward treatment by their coaches. This is particularly true of African-American players, who comprise fifty-seven percent of Division I men’s basketball players.⁹⁶ According to a recent study of African-American and Euro-American high school and college athletes, African-American athletes believe their coaches treat them significantly worse than Euro-American players.⁹⁷

Related and anecdotal evidence appears re-affirming. Consider how in 2005, Joe Paterno, the prominent football coach of Penn State, publicly spoke of “the black athlete,” and Fisher DeBerry, prominent head coach of the Air Force, spoke of “Afro-American kids” and their importance to college sports.⁹⁸ These patterns of treatment are consistent with broader trends of inferior treatment of African-Americans in the workplace.⁹⁹ In contrast, the guaranteed contracts and social-esteem ascribed to NBA players may deter or even preclude NBA coaches from behaving similarly.¹⁰⁰ Perhaps these observations help to explain why 18-year olds

93. For instance, consider that Duke University’s Mike Krzyzewski signed a \$ 6.6 million, sixteen-year endorsement contract with Nike. *Id.* at 191 and accompanying notes.

94. See NCAA Bylaws, art. 15.2.5.4.2.

95. 95.NCAA Const., art. 2.9, available at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_di_manual.pdf.

96. Frank Litsky, *Graduation Rates Higher Among Women’s Round of 16*, N.Y. TIMES, Mar. 28, 2003, at 4 (citing comments by Dr. Richard Lapchick, director of the Institute for Diversity and Ethics in Sport at the University of Central Florida).

97. Steven F. Philipp & Petra B. Schuler, *Differences in African-American and Euro-American Athletes’ Perceptions of Treatment by Coaches*, 98 PERCEPTUAL & MOTOR SKILLS, 1333-36 (2004).

98. Michael McCann, *Racism Among College Football Coaches*, HARV. L. REC., Nov. 10, 2005, at 5.

99. Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443, 444 (1993); see also Joe R. Feagin, Kevin E. Early & Karyn D. McKinney, *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313, 1321 (2001) (discussing “the character and impact of hostile workplace environments endured by many . . . African Americans, and the severe physical and psychological effects this workplace climate can have on their health and well-being.”).

100. In fact, it is often said that in the NBA, the “players call the shots” rather than the coach. See, e.g., Bob Tompkins, *“The Baron of Breakfast” Newest NBA Poster Child*, ALEXANDRIA DAILY TOWN TALK, Mar. 10, 2004, at 2B.

who seek the NBA or NFL may be doing so not merely for monetary reasons. Maybe they and their parents do not want them to play for college coaches who talk about “the black athlete.”

Taken together, these reasons illuminate why the “life experience” endured by college basketball players may be readily distinguished from the “life experience” obtained by typical college students. They may also allude to why of the 65 teams that participated in the men’s 2005 NCAA Tournament, forty-three failed to graduate even half of their players: Many players are not there for school, and those that are often lack the time, normative guidance, and equitable treatment to succeed.¹⁰¹ Yet even if the college experience were to uniquely benefit a premier basketball player, remember that a college education and the life experience it promotes do not comprise a “one-shot deal”: a number of NBA players have gone back to college later in their careers, after they have made their millions.¹⁰² The same is true of many child actors and other young artists.¹⁰³

The NBA also contends that it would be better off if premier amateur players developed their games in college. NBA teams would then have more “information” on prospective draft selections. Team general managers have raised this point. For instance, former Chicago Bulls general manager Jerry Krause complains that players skipping college impedes scouting: “It’s much, much tougher because you’re projecting. Mostly we were looking at full-grown kids (in the past). Now you’re looking at a lot of immature bodies and having to project what they’re going to look like down the road.”¹⁰⁴

Similarly, NBA officials contend that more polished and recognizable NBA rookies would advance league interests. Philadelphia 76ers President Billy King notes, “There will be more of a chance the fans will know a guy’s name. You would have seen him in the (NCAA) tournament, maybe. You’d see a guy who went to Syracuse or a guy who went to Duke and you’d have seen him in the tournament.”¹⁰⁵ Such a sentiment appears bolstered by a very simple application of economics: college basketball

101. UCF/Lapchick Study of NCAA Division I Basketball Tournament Team Graduation Rates Reveal Ongoing Problems, Particularly for African-American Basketball Players, Mar. 15, 2005, www.bus.ucf.edu/sport/ides/cgi-bin/site/sitew.cgi?page=/ides/media.htm (click on *News Release: Keeping Score When it Counts*).

102. Such players include Isaiah Thomas, Julius Erving, Shaquille O’Neal, and Vince Carter. See Gary Hill, *Kids Opting for Draft Dollars over College*, REUTERS, May 18, 2001.

103. Consider Mary Kate and Ashley Olsen, actresses who earned over \$275 million before attending college at New York University. Lorraine Anthony, *Like Britney, Only a Few Notches Up*, CANADIAN PRESS, Sept. 1, 2005, at G09.

104. Mike McGraw, *NBA Teams Must Do Homework on High Schoolers*, CHI. DAILY HERALD, May 17, 2000, at 1.

105. Phil Sheridan, *Nobody Knows These Players*, PHILA. INQUIRER, Jun. 28, 2005, at Sports E01.

serves the NBA as a de facto and free minor-league system that develops and promotes the same players who will one day determine the NBA's financial fate.¹⁰⁶

Despite these performance and product concerns, objective data suggests that prep-to-pro players *outperform* other NBA players. In fact, they average more points, rebounds, and assists than does the average NBA player or the average player of any age group.¹⁰⁷ Some of them, like LeBron James and Tracy McGrady, are among the league's most marketable players.¹⁰⁸ Their success is not surprising, since the NBA and NCAA provided incentives for very few players to bypass college. Indeed, despite popular rhetoric that "many high school kids" declared for the NBA Draft,¹⁰⁹ only 46 of them were eligible to be selected from 1995 to 2005, and of that group, a remarkable 83 percent were drafted (in contrast, less than half of eligible college underclassmen were drafted during that time).¹¹⁰

This Article will not go into detail as to why only premier high school players tended to partake in the Draft, as I have detailed that analysis in other forums.¹¹¹ Instead, this Article will delineate three core reasons: 1) The NCAA removes the Division I eligibility of any amateur who declares for the Draft and then signs with an agent, meaning that all but the top straight-out-of-high-school players were deterred from signing with an agent, forfeiting a scholarship, and partaking in the Draft. 2) Unless a straight-out-of-high-school player was certain to skip college if drafted, the NBA discouraged him from participating in the Draft without the services of an agent. As noted earlier,¹¹² whenever a player is drafted, his rights to

106. Gary Myers, *Clarett Ruled out of Draft NFL's '3-year Rule' is Back—for Now*, N.Y. DAILY NEWS, Apr. 20, 2004, at 62 (noting how the NCAA serves as a "free minor league/developmental system" for pro sports leagues).

107. Morty Ain, *The Spin: Teenage Wasteland*, ESPN THE MAGAZINE, Jul. 18, 2005, at 38 (quoting Michael McCann).

108. For instance, consider the effect of LeBron James: local television ratings for Cavaliers' games, with ratings nearly 200 percent higher this season than during the 2002-03 season—prompting an executive of Fox Sports Net Ohio to remark: "The dramatic jump in our ratings is just another example of the tremendous impact LeBron's had in this market." Roger Brown, *LeBron Works Wonders for Cavs' TV Ratings*, PLAIN DEALER (Cleveland), Dec. 8, 2003, at C2.

109. See, e.g., Jonathan Heeter, *NBA Rule Postpones Dreams of Youth*, AUGUSTA CHRON., July 13, 2005, at C01 (citing remarks by North Carolina head coach Roy Williams).

110. McCann, *Illegal Defense*, *supra* note 5, at 159-160 and corresponding notes; see also Michael McCann, *supra* note 64 (updating statistics); *2005 NBA Draft*, NBA DRAFT NET, available at <http://nbadraft.net/2005.asp> (updating statistics to include statistics from 2005 NBA Draft: 11 prep-to-pro players were eligible to be selected, and nine of them were drafted).

111. See, e.g., McCann, *Illegal Defense*, *supra* note 5.

112. See *supra*, Part II.A

play in the NBA are held by the drafting team for as long as he remains an amateur player, and that team will ultimately pay him according to his original draft position, meaning that he would receive no "improved NBA pay" for any "improved college play." Finally, 3) NBA general managers and prospective draft picks routinely utilize "promises," whereby an NBA general manager pledges to select a player at a certain draft number if he remains on the board. In other words, the draft proves strikingly predictable for those "in the know," as most amateurs know, in advance, the latest when they could be picked.¹¹³ Perhaps the NBA and NCAA did not seek this formula, but they created it nonetheless.

So why would the NBA rationalize an elevated age floor on a paternalistic idea (i.e., that prep-to-pro players would be better off maturing as persons in college) and an erroneous premise (i.e., that prep-to-pro players struggle in the NBA)? One possibility is that by characterizing 18 year-old men—or, as David Stern likes to call them, "kids"—as needing more "life experience" and "player seasoning," it comports to social expectations and prevalent cognitive biases. And, as a general matter, we expect that people mature while they are in college,¹¹⁴ and that basketball players too mature while they are in college. That is, it *seems* that basketball players would benefit from the college experience.

In that respect, knowledge structures may illuminate the NBA's adroit manipulation of fans and media. Knowledge structures are the "intuitive implements"¹¹⁵ that facilitate our social understandings and guide our social judgments.¹¹⁶ Knowledge structures enable the brain to manage a complex array of stimuli and, as explained by Jon Hanson and David Yosifon, allow us to interpret, reason, and classify the objects, experiences, ideas, people, and behavior that we confront at any moment.¹¹⁷ Because our minds cannot

113. See David Steele, *High-Schoolers Will Dominate Upper Picks: Youngsters Make Draft A Puzzle*, S.F. CHRON., Jun. 25, 2001, at C1 (describing use of promises by Boston Celtics in the 2001 NBA Draft).

114. Craig D. Sandok, *Public Educational Institutions and their Unconstitutional Regulation of First Amendment Rights of Fraternal Organizations: An Analysis of the Maryland Plan*, 48 SYRACUSE L. REV. 323, 338-39 (1998) (discussing the decreased liability of universities for their students); see also Richard Morrison, *Price Fixing Among Elite Colleges and Universities*, 59 U. CHI. L. REV. 807, 831 (1992) (noting that college education is expected to bring "heightened political participation, crime reduction, increased productivity, and increased knowledge").

115. RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 18 (Prentice-Hall Inc. 1980).

116. ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 430 (MIT Press 1999).

117. Hanson & Yosifon, *The Situational Character*, *supra* note 51, at 50-51; see also Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 770 (2000) (describing interplay between knowledge structures and schemas, with schemas defined as "knowledge structures that are comprised of assumptions, expectations, and generic prior understandings").

assess every piece of information encountered at every moment, knowledge structures allow our minds to behave as “cognitive misers,” directing attention to the easiest and most obvious information available.¹¹⁸ Through knowledge structures, we develop beliefs, theories, and schema. For that reason, knowledge structures allow us to organize and extract meaning from external stimuli; without them, we would be “unable to generalize from one experience to another, and unable to communicate effectively with each other.”¹¹⁹

Though helpful in simplifying and clarifying the world, knowledge structures often engender inaccurate belief systems. Perhaps the most notorious belief system is group stereotype. Our knowledge structures contain certain beliefs and expectations about groups of persons, such as racial or ethnic groups, but those beliefs and expectations are often wrong.¹²⁰ Social psychologists have conducted numerous experiments indicating that humans tend to disparately regard the identical behavior of white and black persons¹²¹ and of high-socioeconomic and low-socioeconomic persons.¹²² In other words, situational influences, such as the color of another’s skin or her perceived class, tend to animate our decision-making.

To make matters worse, we tend to exacerbate group stereotypes by asking questions about whether there is evidence to confirm them and forgetting to ask whether there is evidence that would negate them.¹²³ In other words, our minds automatically pursue and disproportionately emphasize apparent evidence that confirms our stereotypes.¹²⁴ This is also known as confirmation bias: individuals are subject to ignore or discount information that challenges existing beliefs.¹²⁵ Such phenomena have been

118. *Id.* at 23.

119. KUNDA, *supra* note 116, at 17; *see also* David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 101 (offering linguistic analysis of how knowledge structures provide meaning to words and symbols).

120. NISBETT & ROSS, *supra* note 115, at 35; *see also* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 749-50 (observing knowledge structures as a mode of explaining cognitive structures and racial beliefs); Page, *supra* note 33, at 192-95 (describing role of knowledge structures in formation of racial stereotypes).

121. *See* Hanson & Yosifon, *supra* note 51, at 53 (studying reaction to experimental interaction between two men, with men varying in role and race, and with one man pushing the other (discussing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE*, at xiii (1954))).

122. John M. Darley & Page H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 25 (1983).

123. Hanson & Yosifon, *supra* note 51, at 54; *see also* Cheryl B. Preston, *Baby Spice: Lost Between Feminine and Feminist*, 9 AM. U. J. GENDER SOC. POL’Y & L. 541, 589 (2001) (explaining the pursuit of confirming evidence of group stereotype in setting of females in the workplace).

124. *See* KUNDA, *supra* note 116, at 111-15, 123-30.

125. Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: The Problem*

identified in business contexts, with managers tending to avoid consultation with “Devil’s advocates” among their group of advisors,¹²⁶ and in the context of professional sports, with professional athletes favorably interpreting ambiguous information and dismissing negative information about their team after enjoying an especially positive experience with that team.¹²⁷

Accordingly, it is not surprising that in spite of prep-to-pro players’ widespread success, some basketball observers tend to amplify and mischaracterize the comparatively few failed prep-to-pro players. Consider recent remarks by Georgia Tech coach Paul Hewitt regarding the new age floor: “I think (the new rule) will be good for the NBA, and for some of those kids. They’ll have been prevented from making a tragic mistake. For every LeBron James, I can show you 30 who have a poor adjustment (to the pros) or no career at all.”¹²⁸

So, who exactly are these “30 kids” that made “a tragic mistake”? It is not clear, since of the 36 players who made themselves eligible for the NBA Draft out of high school from 1995 to 2004, 30 of them played in the NBA, 11 made all-star or rookie all-star teams,¹²⁹ and 27 are still on NBA rosters, earning more money in one year than most of the readers of this Article will earn in five or 10 years, or perhaps in their lifetime.¹³⁰

Along those lines, consider how critics often hoist the name “Korleone Young” as a scarecrow to would-be high school players in contemplation of skipping college. Who is “Korleone Young,” you may rightfully ask? A

of Market Manipulation, 74 N.Y.U. L. REV. 630, 647-50 (1999). A corollary to confirmation bias is “self-serving” or “egocentric” biases, whereby individuals interpret information in a way that disproportionately favors their own position. Unlike confirmation bias, however, self-serving or egocentric biases are likely consciously present. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997) (discussing the impact of self-serving biases on settlements); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 206 n.199 (2000) (noting that these biases may increase plaintiffs’ risk in seeking frivolous litigation).

126. Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1394 n.146 (2002) (discussing the business strategy of introducing “cognitive conflict” to groups to bring positive change).

127. McCann, *It’s Not about the Money*, *supra* note 5.

128. Jack Wilkinson, *National Signing Day: Age Limit Amps up Influx of Talent*, ATLANTA J. & CONST., Nov. 9, 2005, at B1.

129. Kevin Garnett (All-Rookie, All-Star), Kobe Bryant (All-Star), Jermaine O’Neal (All-Star), Tracy McGrady (All-Star), Rashard Lewis (All-Star), Darius Miles (All-Rookie), Amare Stoudamire (All-Rookie, All-Star), LeBron James (All-Rookie, All-Star), Dwight Howard (All-Rookie), Al Jefferson (All-Rookie), Josh Smith (All-Rookie). See Players’ Profiles, <http://www.nba.com/players> (discussing each player’s career highlights)(last visited on Mar.1, 2006).

130. Mark Alesia, *Is it Fair for NBA to Keep Youth Out?*, INDIANAPOLIS STAR, Apr. 27, 2005, at D01 (mentioning the enormous financial stakes of the picks).

second round pick of the Detroit Pistons in the 1998 NBA Draft, Young jumped straight from high school to the NBA, and then proceeded to play poorly, leading to his release after one season. In that season, his contract called for him to earn \$287,500, significantly more in value than a full scholarship to the most expensive of universities.¹³¹ Young would never appear in another NBA game.

Ignoring Young's earnings and subsequent professional achievements, critics of prep-to-pro players often describe him as a human tragedy, a victim of some terrible, exploitive system that required change. "There are sad stories such as Korleone Young's; he declared himself ready for the NBA after high school, but never made it."¹³² "[I]f only to give the. . . Korleone Youngs of the world – high school superstars who became trivia questions after failing to make the NBA upon skipping college entirely – an introduction to a world beyond basketball's slimy underbelly."¹³³

Obviously, these critics place disproportionate emphasis on Korleone Young in relation to the broader success of prep-to-pro players, and they ignore his strikingly lucrative earnings for one-year of work. But more subtly, those critics fail to reveal, let alone answer, the question they beg: *What actually happened to Korleone Young?* Why, again, was he a tragedy? Would he squander his earnings after his NBA career ended so quickly? Would he turn to crime or delinquency without the benefit of life experience or college?

Interestingly, Korleone Young would continue to play professional basketball, and he continues to do so today, eight years after his "tragic" decision. Living in places like Roseto, Italy and Melbourne, Australia, he has earned between \$50,000 and \$100,000 per year to play two or three basketball games a week for eight months of the year.¹³⁴ In other words, he earns considerably more and works substantially less than does the average American¹³⁵ or the average college graduate.¹³⁶

131. McCann, *Illegal Defense*, *supra* note 5, at 141.

132. Tony Kornheiser, *For Golfing Prodigy Tyron, Youth Brings Mixed Blessings*, WASH. POST, Dec. 9, 2001, at D5.

133. Mark Wiedmer, *NBA Age Rule Would Help Basketball*, CHATTANOOGA TIMES FREE PRESS, Apr. 20, 2005, at D1.

134. Young currently plays in Italy. See Korleone Young-Profile, <http://www.eurobasket.com/player.asp?Cntry=ITA&PlayerID=17828> (last visited on Jan. 5, 2006). For more on his career and earnings, see McCann, *Illegal Defense*, *supra* note 5, at 141, 150-51, 164-65.

135. The average American earns \$37,000 a year. Richard Cohen, *Social Security, Day by Day*, WASH. POST, May 3, 2005, at A21. The average American works 43.4 hours a week for eleven months out of the year. Karen Schill Rives, *Rising Telecomplaints*, NEWS & OBSERVER, May 10, 2001, at D1 (citing Federal Bureau of Labor statistics).

136. According to a survey conducted by the Graduate Management Admission Council, the average college graduate earns \$41,000 a year as starting salary. D.C. Denison, *Back to Basics*, BOSTON GLOBE (MA), Mar. 31, 2002, at C1.

So why does the Korleone Young tall-tale enjoy so much popular resonance? Why is it repeated over and over again, and accepted as absolute truth? As implied above, an emphasis on Young's failed NBA career, while ignoring everything else about him, comports to confirmation bias: We tend to amplify information that bolsters and to dismiss information that refutes our original premise, which itself may be the product of distorted thinking and knowledge structures.¹³⁷

Consider also the possibility of framing effects: we tend to respond varyingly to identical outcomes when they are positioned or worded differently.¹³⁸ For instance, when individuals are presented with a hypothetical choice on how to dispense a vaccine to 600 persons, with one choice resulting in 200 people dying but sparing the rest, and the other "saving" only 400 people, they are less likely to endorse a policy where "200 people will be saved" than one where "400 people will die."¹³⁹ Not surprisingly then, if we compare Korleone Young to superstar NBA players, we view him as a failure; if we compare him to us, then he appears to be doing quite well. In other words, we can be easily manipulated by the framing of a question or a reference, and often not know it. Taken together then, our assessment of NBA policies tends to evince our stereotypical and flawed thinking, deeply affected by situational influences, and deeply vulnerable to external manipulations even though we genuinely believe that we are engaged in calculated and deliberative rationalization.

This point presents broader implications. Perhaps it begins to explain why society finds it imperative to protect eighteen year-old African American men—"kids"—from playing in the NBA or the NFL, but not from fighting in wars or working at McDonald's. Or why does society describe sixteen year-old golf prodigy Michelle Wie as "precocious" and "mature" after signing a \$10-million endorsement contract,¹⁴⁰ but express grave concerns about the welfare of a "naïve" seventeen year old LeBron James attracting mere interest from endorsers?¹⁴¹ Moreover, why does

137. Economists have observed similar phenomena in their own modes of analysis. Perhaps most famously, John Kenneth Galbraith once remarked, "the hallmark of the conventional wisdom is acceptability." JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 11 (1958).

138. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984).

139. *Id.*

140. See, e.g., Doug Haller, (10) *Million Dollar Baby*, ARIZ. REPUBLIC, Oct. 6, 2005, at A1 ("It's interesting. People don't want to talk about Michelle Wie's golf game. They want to discuss her presence. Graceful and confident, poised and mature."); Fred Lewis, *Lessons Never Stop, Even as a Pro*, HONOLULU ADVERTISER, Oct. 17, 2005, at 1D ("When it comes to the precocious Wie, very little that surrounds her is routine.").

141. See, e.g., Ray Deering, *Resisting Money Tough James Test*, CHATTANOOGA TIMES FREE PRESS, Dec. 15, 2002, at C2 ("If that's not enough to tempt a naive adolescent, just imagine how many millions the avaricious shoe companies are ready to toss his way in

society celebrate actors like Anna Paquin and Leonardo DiCaprio when they earn millions starring in films, while it casts dispersions on African-American men for doing the same in professional sports? Our expressed convictions are remarkably vulnerable to situational influences.

For the NBA, the “situation” of age enables it to exert greater control over players, while simultaneously appeasing fans and media alike. Thus, it comports with other mechanisms of control, such as the rookie wage scale and the dress code, that likewise benefit from cognitive biases and situational distortions. Moreover, situational influences empower the NBA to distract dissatisfied NBA fans from the root of their dissatisfaction. Just consider the seldom-discussed effect of NBA franchise expansion on talent dilution: There are roughly 30 percent more NBA teams and players today than there were in 1986, meaning many of today’s starters would be bench players 20 years ago. For that reason and to the extent persons no longer find the NBA enjoyable, perhaps those persons should ponder dramatic league growth and its repercussion on talent. Yet instead, by manipulating social concerns of age, immaturity, and avarice, the NBA can isolate players and their presumed choices as explanatory, while simultaneously obscuring league efforts to expand revenue at the expense of product quality.

III. “CONTROL” AND EDDY CURRY: FURTHER EVIDENCE OF A BROADER PLAN

This Article has thus far detailed a broader effort by the NBA to enhance control over NBA players. This effort proves compatible with situational expectations, which are reflective of cognitive biases and knowledge structures. As a result, NBA players experience diminutions in financial compensation, scope of personal expression, and right to work. Though doubtlessly meaningful and profoundly unfair, those “costs” pale in comparison to a fourth manifestation of this broader effort: requiring players to take DNA tests as a prerequisite to contract formation. Given the legal, ethical, and social considerations of required DNA testing, this manifestation deserves its own Part.

Required DNA testing of NBA players presents a new and novel issue. It arose in August 2005, when the Chicago Bulls informed star center, Eddy Curry, that a new contract would be conditioned on passage of a DNA test, with “passage” determined by the Bulls’ medical staff. This Part will discuss the “situation” of Curry, his heart, and the Bulls demand, and how it further illuminates NBA efforts to control players at the expense of player autonomy and at the convenience of situational presumptions.

This Article argues that required genetic testing evinces an unacceptably intrusive and likely illegal attempt by the NBA to achieve these objectives.

A. *Eddy Curry and His Heart*

Eddy Curry's NBA career began in 2001, when he was selected by the Chicago Bulls with the fourth overall pick in the NBA Draft.¹⁴² Standing at 6'11 and weighing 285 pounds, Curry had recently completed high school at nearby Thornwood High (South Holland, Illinois). Per the rookie wage scale, Curry signed a three-year contract worth \$9 million.¹⁴³ His play immediately impressed. In just his second season, Curry led the NBA in field goal percentage, becoming the first Bull to lead the NBA in a major statistical category since Michael Jordan in 1998.¹⁴⁴ By Curry's third season, superstar Shaquille O'Neal would remark, "Outside myself, Eddy Curry may be the best center in the league."¹⁴⁵ His best play would emerge in his fourth season—the 2004-05 season—when he would average team-and-career highs in points per game, while leading the Bulls to their first Playoff berth since 1998.¹⁴⁶ Set to become a restricted free agent in the summer of 2005, Curry's spectacular play appeared well-timed for his future employment prospects.

But the 2004-05 season brought with it a serious health concern that would cast a shadow on Curry's future, NBA and otherwise. On March 28, 2005, he experienced heart-related discomfort during a game against the Memphis Grizzlies, and then again two days later, prior to a game against the Charlotte Bobcats, prompting the Bulls to pull him from the lineup.¹⁴⁷ Within two weeks, Curry would be examined by prominent cardiologists in Charlotte, Chicago, Minneapolis, and Boston.

Curry would be diagnosed as having suffered an arrhythmia, a change in the rhythm of his heartbeat.¹⁴⁸ His specific arrhythmia was consistent with non-sustained ventricular tachycardia, a rapid heartbeat initiated within the ventricles and characterized by three or more consecutive premature ventricular beats.¹⁴⁹ Though worrisome, Curry's arrhythmia did

142. See McCann, *Illegal Defense*, *supra* note 5, at 144.

143. *Id.*

144. *Eddy Curry - Profile*, http://www.nba.com/playerfile/eddy_curry/bio.html (last visited on Jan. 5, 2005).

145. Lacy J. Banks, *Paxon, Pippen, Playoffs*, CHI. SUN-TIMES, Sept. 28, 2003, at 108.

146. *Eddy Curry - Profile*, *supra* note 144.

147. Michael Hirsley, *Curry Worry Downplayed*, CHI. TRIB., Apr. 1, 2005, at Sports 5.

148. For extensive insight on arrhythmia, *See generally* David S. Cannom & Eric N. Prystowsky, *Management of Ventricular Arrhythmias: Detection, Drugs, and Devices*, 281 J. AM. MED. ASS'N 172 (1999).

149. *Curry's Condition*, CHI. TRIB., Apr. 15, 2005, at Sports 14.

not appear symptomatic of serious blockage or heart disease,¹⁵⁰ and his heart would pass a battery of laborious and taxing cardiological examinations.¹⁵¹ Most notably, cardiologist Mark Estes, a professor at Tufts University School of Medicine and director of New England Medical Center's Arrhythmia Center, examined Curry and concluded that his arrhythmia was consistent with "athlete's heart," a usually benign enlargement of the left ventricle's wall thickness triggered by constant and strenuous exercise.¹⁵² Along those lines, Bulls' team physician Kathy Weber stated that Curry's arrhythmia "appears to be benign."¹⁵³ As a result, it was widely-presumed that Curry would resume play.¹⁵⁴

Unexpectedly, however, the Bulls announced that Curry would not play the remainder of the 2004-05 season.¹⁵⁵ The Bulls appeared animated by the advice of Minneapolis-based cardiologist Barry Maron, a leading expert on HCM.¹⁵⁶ Unlike the other cardiologists who had examined Curry and diagnosed him with athlete's heart, Dr. Maron warned that Curry's symptoms may be consistent with HCM.¹⁵⁷ Usually an inherited disease that causes the heart to become too thick, HCM obstructs blood flow and impairs breathing.¹⁵⁸ Exceedingly rare, HCM afflicts only 0.1 to 0.2 percent of the population.¹⁵⁹ Proper medication can typically enable those with HCM to live normal lives.¹⁶⁰ HCM seldom presents symptoms among young adults, routine physical examinations may not reveal its presence,¹⁶¹ and the extra strain of excessive exercise may trigger sudden death among

150. *Id.*; see also Frank Isola, *Laying it on the Line*, N.Y. DAILY NEWS, Dec. 9, 2005.

151. Lacy J. Banks, *Doctors Upbeat about Curry Return*, CHI. SUN TIMES, Apr. 15, 2005, at 155.

152. Carol Slezak, *No Easy Answers for Curry*, CHI. SUN-TIMES, Jun. 26, 2005, at Sports 104; see also Lacy J. Banks, *Specialist Signs off on Curry*, CHI. SUN TIMES, Jun. 24, 2005, at Sports 148.

153. K.C. Johnson, *Out but not Down*, CHI. TRIB., Apr. 15, 2005, at Sports 1.

154. *Id.*

155. *Id.*

156. K.C. Johnson, *OK Near for Curry*, CHI. TRIB., Jun. 23, 2005, at Sports 1 (noting that Curry had been examined by Dr. Maron).

157. *Id.*

158. Franz, *supra* note 3.

159. Stefan Lovgren, *Athens Olympics May be Most Physically Demanding Ever*, NAT'L GEOGRAPHIC, Aug. 5, 2004, http://news.nationalgeographic.com/news/2004/08/0804_040804_olympics_athens.html (last visited May 9, 2006); National Heart, Lung, and Blood Institute, Facts About Heart Disease: Cardiomyopathy, <http://www.nscardiology.com/factscardiomyopathy.htm> (last visited Jan. 5, 2006).

160. See Medline Plus Medical Encyclopedia: Hypertrophic Cardiomyopathy, <http://www.nlm.nih.gov/medlineplus/ency/article/000192.htm> (last visited, May 9, 2006) (noting that some individuals with HCM "remain without symptoms for many years and have a normal life span").

161. *Id.*

those with HCM.¹⁶² Indeed, HCM was the official cause of death of two prominent basketball players: Twenty-seven year old Reggie Lewis of the Boston Celtics and twenty-three year old Hank Gathers of Loyola Marymount University.¹⁶³

Despite the organization's decision to sit Curry, Bulls general manager, John Paxson, indicated that the team would re-sign Curry as a restricted free agent. Paxson stated, "He's going to be back here."¹⁶⁴ That promise to be proved strikingly conditional. In June 2005, and with restricted free agency approaching one month later, the Bulls requested more information about Curry's heart. In response, Curry was examined by renowned cardiologist, David Cannom, medical director of cardiology at Good Samaritan Hospital in Los Angeles and a clinical professor at the UCLA School of Medicine. The exam proved successful, as Dr. Cannom determined that Curry's enlarged heart was the result of exercise and not any disease.¹⁶⁵ His assessment was consistent with that of Dr. Estes and the other cardiologists who had examined Curry in April. Following the examination, the Bulls expressed confidence in Curry's health. Specifically, Paxson remarked, "Cannom's recommendations will go a long way."¹⁶⁶ Apparently satisfied, the Bulls extended a \$5.14 million qualifying offer to Curry, making him a restricted free agent.¹⁶⁷

After some apparent internal debate, however, the Bulls informed Curry that their offer was conditioned on his passing a team-supervised DNA test for HCM.¹⁶⁸ Such a test would have been unprecedented: A professional sports team had never required that one of its players/employees undergo a DNA test, or conditioned a contract on the taking and passing of a genetic examination. Arguably, it also appeared unnecessary, as an echocardiogram—a less invasive examination where ultrasound is used to examine the heart¹⁶⁹—also reveals the presence of HCM,¹⁷⁰ and Curry had already passed an echocardiogram. He had passed

162. Lovgren, *supra* note 159.

163. Ian Thomsen, *Change of Heart*, SPORTS ILLUSTRATED, Oct. 31, 2005, at 26. Note that some posit cocaine use as the cause, or a highly-salient contributing cause, of Reggie Lewis' death. See, e.g., *Regulations Governing Drugs and Performance Enhancers in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 337, n.180 (2002).

164. K.C. Johnson, *Out but not Down*, CHI. TRIB., Jun. 23, 2005, at Sports 1.

165. Lacy J. Banks, *Source Says Doctor Gives Curry OK to Play*, CHI. SUN-TIMES, Jul. 1, 2005, at 122; see also K.C. Johnson, *Curry Expected Back Thursday*, CHI. TRIB., Jun. 29, 2005, at C7 (providing detail on Dr. Cannom's conclusions).

166. See Johnson, *supra* note 165.

167. K.C. Johnson, *Curry Ready for Restart*, CHI. TRIB., Jul. 1, 2005, at C8.

168. Mike McGraw, *Tough Day for Bulls: Curry goes to Knicks*, CHI. DAILY HERALD, Oct. 4, 2005, at 1.

169. MedlinePlus Medical Encyclopedia: Echocardiogram, <http://www.nlm.nih.gov/medlineplus/ency/article/003869.htm> (last visited May 7, 2006).

170. Thomsen, *supra* note 163.

other diagnostic exams as well, including a magnetic resonance image (“MRI”) of the heart and an electrocardiogram, which is a test that records the heart’s electrical activity.¹⁷¹

Curry refused the Bulls’ request, noting the unusualness and invasiveness of a DNA test, along with what he considered its apparent needlessness: He had already passed an echocardiogram and other HCM-indicating examinations, and a group of cardiologists that had examined him agreed that his symptoms were consistent with athlete’s heart. At a later date, the Bulls told Curry that if he failed the DNA exam, the team would be willing to pay him \$400,000 annually for the next 50 years.¹⁷²

Unable to work out a mutually satisfactory agreement, the Bulls traded Curry to the Knicks.¹⁷³ Notably, the Knicks did not require that Curry take a genetic examination. After Curry re-took and passed a series of examinations, and after the NBA had a cardiologist examine and approve their results,¹⁷⁴ the Knicks promptly signed him to a guaranteed, six-year contract worth \$56 million.¹⁷⁵ Curry has quickly become one of the Knicks’ best players, and, more importantly, has not experienced any heart-related difficulties.

Curry’s decision to refuse the DNA test invites inquiry as to the nature of genetic testing and its appropriateness as a contractual requirement for NBA players. The following two sections examine these issues.

B. *A Brief Primer on Genetic Testing*

Genetic tests present both great value and concern. Their use and history have been well-traveled topics in legal scholarship,¹⁷⁶ and this Article will only highlight certain key aspects. Although there are a variety

171. MedlinePlus Medical Encyclopedia: ECG, <http://www.nlm.nih.gov/medlineplus/ency/article/003868.htm> (last visited May 8, 2006).

172. Marc Berman, *Knicks Land Curry*, N.Y. POST, Oct. 4, 2005, at 72.

173. *Id.*

174. Howard Beck, *Curry Raises Concerns Over Testing by Teams*, N.Y. TIMES, Oct. 28, 2005, at D4.

175. Spears, *supra* note 4.

176. See, e.g., Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV. 965 (2004) (arguing for new legal doctrines that focus on the impact of technological innovations, including genetic testing); Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL’Y 225 (2000) (describing the growth in the use of genetic testing to discriminate in areas such as employment); Mark A. Rothstein & Sharona Hoffman, *Genetic Testing, Genetic Medicine, and Managed Care*, 34 WAKE FOREST L. REV. 849, 852 (1999) (discussing the “concerns about privacy and confidentiality for both patients and healthcare providers” raised by genetic testing); Richard H. Underwood & Ronald G. Cadle, *Genetics, Genetic Testing, and the Specter of Discrimination: A Discussion Using Hypothetical Cases*, 85 KY. L.J. 665, 667 (1996) (exploring “the relationship between developments in genetic science, law and public policy”).

of methods for testing,¹⁷⁷ genetic testing mainly entails an evaluation of a patient's DNA for mutated sequences.¹⁷⁸ DNA is a nucleic acid that contains the genetic instructions specifying the biological development of life. Biological development, however, cannot be gleamed entirely from genetic tests, because they reveal only a probability of development. Certain mutated genes, such as the BRCA1 mutation or the "breast cancer gene," are often not predictive.¹⁷⁹ In other words, a test may reveal a susceptibility to a certain disease, but not certainty of actually developing the disease.

Genetic testing can accord significant benefit to patients. Perhaps most obviously, genetic tests enable persons to prepare for and possibly correct future medical ailments.¹⁸⁰ Similarly, genetic tests may provide psychotherapeutic relief, given that a negative result may relieve stress and anxiety, while a positive result may lend greater certainty in evaluating care options.¹⁸¹ Along those lines, genetic tests may illuminate possible risks in certain activity, such as procreation.¹⁸² Genetic tests may also animate constructive activity among those who share genetic makeup with the examinee, such as siblings and children, as they may receive encouragement to likewise evaluate possible health risks.¹⁸³

Despite their meaningful benefits, genetic tests invite numerous potential drawbacks. First, consider personalized concerns. Namely, individuals may overreact to news of disease susceptibility and mistake disease susceptibility for disease certainty. Indeed, humans tend to overreact to "bad news" and sometimes fail to perceive nuanced, but crucial distinctions.¹⁸⁴ Speculatively, the informational benefit associated

177. Miller, *supra* note 176, at 230.

178. Jennifer Chorpeneing, *Genetic Disability: A Modest Proposal To Modify the ADA To Protect Against Some Forms of Genetic Discrimination*, 82 N.C. L. REV. 1441, 1449 (2004).

179. Miller, *supra* note 176, at 230-31.

180. See, e.g., Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J. L. & MED. 1, 49-50 (2002) (discussing how the predictive use of genetic test results may effect the relationship between insurance companies and the insured); Georgia L. Wiesner, *Clinical Implications of BRCA1 Genetic Testing for Ashkenazi-Jewish Women*, 7 HEALTH MATRIX 3 (1997) (exploring the potential risks and benefits of cancer susceptibility genetic testing).

181. See, e.g., *Test Will End Pregnancy Wait Agony*, BIRMINGHAM POST, Jul. 3, 1998, at 3 (discussing how a DNA test can relieve anxiety of pregnant women).

182. *Id.*

183. See, e.g., Mike Dorning, *Deadly Shadow*, CHI. TRIB., Mar. 21, 1993, at C14 (describing decision of a woman who elected to take a DNA test to find out whether she carried the same gene as her brother).

184. See, e.g., Diane Scott Docking & Paul D. Koch, *Sensitivity of Investor Reaction to Market Direction and Volatility: Dividend Change Announcements*, J. FIN. RESEARCH, Mar. 22, 2005, at 21 (describing tendency of investors to overreact to bad news); Barry L. McCurdy et. al, *Positive Behavior Support in Urban Schools: Can We Prevent the Escalation of Antisocial Behavior?*, J. POSITIVE BEHAVIOR INTERVENTIONS, Jun. 22, 2003, at

with genetic tests may be counteracted by the potential of vexatious, stress-induced reactions.

Along those lines, humans tend to vastly overestimate the intensity and duration of their emotional reaction to happenings and encounters, as their initial reaction often wears off much faster than originally presumed.¹⁸⁵ That is known as “impact bias,” the idea that we engage in overly-optimistic or overly-pessimistic projections, thus leading to affective forecasting errors.¹⁸⁶ It is why, for instance, the happiness generated by winning the lottery or landing a coveted job tends to wane faster than first imagined, or why the sadness brought about by losing a job or suffering a break-up in a relationship tends to dissipate far faster than initially estimated.¹⁸⁷ Consequently, learning of *potentially* terrible news may compel persons to behave in ways inconsistent with their long-term interests.

Personalized concerns to DNA testing are dwarfed by those that are externally exploitable. Foremost, genetic test results may be exploited by others in deleterious ways. That is especially apparent in the context of employers and insurance companies, which have increasingly sought and obtained genetic information.¹⁸⁸ Indeed, genetic tests reveal extraordinary amounts of information. A test for one possible health ailment (e.g., HCM) may reveal other ailments (e.g., a predisposition to cancer). That practice is consistent with employers’ growing efforts to obtain prospective and current employees’ family medical histories for hiring and retention based decisions.¹⁸⁹ For these reasons, notes Paul Stevens Miller, former Commissioner of the United States Equal Employment Opportunity Commission, “[i]f employers are permitted to base personnel decisions on genetic information, people will be unfairly barred or removed from working for reasons unrelated to their ability to perform their jobs.”¹⁹⁰

Consider also the salience of cognitive biases among employers who

158 (describing tendency of parents to overreact to negative news from school about their children’s behavior).

185. Hanson & Yosifon, *supra* note 33, at 118.

186. *Id.*

187. *Id.*

188. See Miller, *supra* note 176, at 235 (describing instances of abuse by employers and insurance companies in utilizing genetic testing, and how such instances appear to be increasing as the testing technology becomes less expensive); see also Mark A. Rothstein, *Genetics and the Workforce of the Next Hundred Years*, 2000 COLUM. BUS. L. REV. 371 (2000) (forecasting the future of genetic testing in the workplace).

189. *AMA Workplace Testing Survey*, AMERICAN MGMT. ASS’N, Mar. 24, 1999, at 36-37. There is also evidence that insurance companies may seek policies that enable them to observe genetic information of policy-holders. Natalie Anne Stepanuk, *Genetic Information and Third Party Access to Information: New Jersey’s Pioneering Legislation as a Model for Federal Privacy Protection of Genetic Information*, 47 CATH. U. L. REV. 1105, 1110 (1998).

190. Miller, *supra* note 176, at 226.

already internalize a dislike towards a particular job applicant or a current employee. As discussed in Part I, confirmation bias can compel individuals to ignore or discount information that challenges existing beliefs. That effect has been evidenced in the employment context. Indeed, as soon as a manager develops reservations about an employee's competence, the manager tends to negatively interpret circumstances concerning that employee.¹⁹¹ Thus, a particular employee's disease or genetic predisposition to a disease may be viewed with greater concern than if a different employee possessed the same disease or an identical predisposition.

Ethical concerns also prove paramount when assessing the social function of genetic testing. Genetic information—the information that literally reveals our identity—appears particularly imperative in how we assess our “autonomy,” or how we conceive of ourselves in relation to others.¹⁹² Disclosure of such information may trigger stigmatization and reinforcement of negative cultural stereotypes.¹⁹³ Similarly, genetic testing can erode confidentiality between persons¹⁹⁴ and impair broader conceptions of privacy in the workplace.¹⁹⁵

Likewise, existing laws fail to provide adequate safeguards against the manipulation of genetic testing results. For instance, courts appear undecided as to whether the American with Disabilities Act regulates employers' use of genetic testing.¹⁹⁶ Moreover, scholars tend to regard Title VII of the Civil Rights Act as insufficient recourse for plaintiffs

191. Jean-Louis Barsoux & Jean-Francois Manzoni, *FT Report: Mastering Management*, FIN. TIMES, Nov. 15, 2002, at 6.

192. John C. Fletcher & Dorothy C. Wertz, *After the Human Genome is Mapped*, 39 EMORY L.J. 747, 752-53 (1990); see also Shana Kaplan, *From A to Z: Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Disposition Agreements*, 81 B.U. L. REV. 1093, 1107 (2001) (describing autonomy in the context of the individual medical decision-making and related social construction).

193. Shelia Jasanoff, *Biology and the Bill of Rights: Can Science Reframe the Constitution*, 13 AM. J. L. & MED. 249, 274 (1987).

194. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1342 (2000) (discussing potential harm to patient confidentiality in context of adolescents). See generally, Paul A. Lombardo, *Genetic Confidentiality: What's the Big Secret?*, 3 U. CHI. L. SCH. ROUNDTABLE 589 (1996) (discussing the possibility of genetic testing infringing on the privacy rights of individuals).

195. See generally, Lori B. Andrews & Ami S. Jaeger, *Confidentiality of Genetic Information in the Workplace*, 17 AM. J. L. & MED. 75, 76 (1991) (“[G]enetic testing in the workplace raises issues about who should have access to the results.”); Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protection for a Brave New World*, 96 NW. U. L. REV. 1497, 1501 (2002) (“[E]mployer use of genetic information primarily threatens the value of individual autonomy.”).

196. See e.g., Andrews, *supra* note 195 at 107 (stating that coverage under the Act is uncertain because “it is not clear whether a person with an increased risk of disease due to genetic factors will be viewed as having a disability.”).

adversely affected by employers' misuse of genetic testing.¹⁹⁷ States also vary widely in their protection of employees from employer-mandated genetic testing and related issues.¹⁹⁸ Consequently, an employer-mandated DNA test would appear to position an employee in an extraordinarily tenuous position: Absent certain contractual provisions or industry standards, she may not enjoy a viable legal recourse to contest a radical imposition on her personal autonomy and may thus be forced to resign or undergo the exam.

C. *Implications of Genetic Testing of NBA Players*

Particularly given its conflict with ethical norms and the vast majority of medical recommendations, the Bulls' insistence that Curry undergo a DNA test begs both empirical and normative questions: Do NBA teams possess the legal authority to condition player-contracts on passage of a genetic examination? Should NBA teams have that authority?

The legal framework for genetic testing of NBA players appears conditioned on interpreting of the CBA. As noted earlier, courts accord broad deference to CBAs between negotiating units.¹⁹⁹ Consequently, an analysis of NBA teams' capacity to force genetic examinations appears contingent upon collectively-bargained rules between the NBA and NBPA.

Quite obviously, the Bulls could not "force" Curry to take a medical exam under any circumstance. However, they were afforded significant leverage under the 2005 CBA in requiring players to undergo medical exams as a condition of employment. Namely, according to Article II, Section 13, they may refrain from validating a new contract, or seek to void an existing contract, if a player does not pass a physical examination.²⁰⁰ Separately, Exhibit 6 dictates that a team-designated physician, rather than one selected by the player or by both the team and player, enjoys sole discretion in approving a physical,²⁰¹ while Article II, Section 12(h)

197. See generally Miller, *supra* note 176 (arguing that legislation against the misuse of genetic information in the workplace should be cast as protection of employees' rights to privacy rather than as protection against discrimination).

198. As of 2005, thirty-three states prohibit genetic discrimination in hiring/firing or terms and privileges of employment; eighteen prohibit employers from requesting genetic information from employees; twenty-five prohibit employers from requiring genetic information from employees; sixteen prohibit employers from performing genetic tests on employees; ten prohibit employers from obtaining genetic information from employees' genetic test results; and 13 have specific penalties for genetic discrimination in employment. National Conference of State Legislatures, NCSL Genetic Tables (2005), <http://www.ncsl.org/programs/health/genetics/ndiscrim.htm> (last visited April 21, 2006).

199. See *supra* notes 30-34 and accompanying text.

200. 2005 CBA, Art. (II)(xiii), *supra* note 17, available at http://nbpa.org/cba_articles/article-II.php (last visited Jan. 5, 2006).

201. *Id.* Ex. 6, available at http://nbpa.org/cba_exhibits/exhibitA-6.php (last visited Jan.

provides that the player “must . . . submit to all examinations and tests requested of him.”²⁰²

At first glance, the CBA appears to have afforded the Bulls with boundless latitude in both requesting and evaluating medical information from Curry. Less clear is whether the NBA and NBPA contemplated the use of genetic tests when they agreed to the phrase, “all examinations and tests requested of him.”²⁰³ Indeed, to date, the only apparent use of required genetic tests in professional sports has been with horses.²⁰⁴ Correspondingly meaningful, the CBA does not contain any language pertaining to “genetics,” “DNA,” or similar verbiage. The same is true of collective bargaining agreements in Major League Baseball, the National Football League, and the National Hockey League.²⁰⁵ In other words, it appears highly unlikely that the NBA and NBPA contemplated genetic testing while negotiating their CBA; particularly given the novelty and controversy of such testing, it seems nearly-certain that any substantive contemplation would have been reflected in contractual wording.

This point bears significance, as courts regularly interpret collectively-bargained language whenever that language proves ambiguous.²⁰⁶ Indeed, courts often seek to determine parties’ intent, as well as industry standards and norms.²⁰⁷ Suggestively, therefore, a court addressing the NBA’s rights to force a DNA test would likely assess the following considerations: the ambiguity of Article II, Section 12(h), the absence of apparent contemplation by the NBA and NBPA, the absence of mandatory genetics testing in professional sports, and the prevalence of often comparable and less-invasive alternatives, such as echocardiograms and MRI exams. More broadly, a court may consider the ethical and psychological concerns of genetic testing, as well as a general social disfavor of required genetics

5, 2006).

202. *Id.* Art. (II)(xii)(h)(i), available at http://nbpa.org/cba_articles/article-II.php (last visited Jan. 5, 2006).

203. *Id.* Art. (II)(xii)(h)(i), available at http://nbpa.org/cba_articles/article-II.php#section12 (last visited May 7, 2006).

204. See DNA Registry for Horses?, <http://www.horsetalk.co.nz/health/dna.shtml> (last visited May 7, 2006) (describing the DNA test required to register a horse).

205. MLB CBA, available at http://us.il.ying.com/us.ying.com/i/spo/mlbpa/mlbpa_cba.pdf (last visited Jan. 5, 2006); NFL CBA, available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited Jan. 5, 2006); NHL CBA, available at <http://www.nhl.com/nhlhq/cba/> (last visited Jan. 5, 2006).

206. See, e.g., *Commonwealth Commc’ns., Inc. v. NLRB*, 354 U.S. App. D.C. 96 (2002) (analyzing parole evidence to manifest intent of parties regarding ambiguous provision); *Aguilar v. Basin Res., Inc.*, 47 Fed. Appx. 872 (10th Cir. 2002) (examining ambiguous provision by addressing industry standards and common practices).

207. *Commonwealth Commc’ns.*, 312 F.3d at 468.

examinations.²⁰⁸ On the other hand, a court may evaluate possible liability to teams by employing players with medical conditions. But then again, that concern appears diminished when, in conjunction with the player assenting to his own return to play, a group of specialists examine the player and assent to his return.

Yet even if a court considered required genetic examinations to be compatible with the CBA, *should* NBA teams compel players to take them?

The first consideration is one of precedent: If we consider a required genetic examination to be an acceptable demand, then why has no team, in *any* sport, ever made such a demand before? Certainly, profoundly unusual or unprecedented circumstances *may* call for reconsideration of established procedures, but Curry's condition appears far from extraordinary. Indeed, a group of prominent cardiologists opined that Curry need not undergo a DNA test, as other tests—namely the echocardiogram—very likely supplied the requisite information. The same testing framework can be anticipated of the vast majority of medical conditions. So why break precedent and force a person to undergo an invasive exam when existing and less invasive procedures already appear sufficient?

Diminution of a player's autonomy supplies a second consideration. Imagine, for instance, that Curry passes a DNA test, but the test reveals that he has a predisposition to alcoholism or a predisposition to heart disease. Understandably, Curry and his family may not want to know such information. Would Curry be in the peculiar circumstance of undergoing a medical exam and not learning of its results? Alternatively, would the stress of "not knowing" weigh on his mind, and ultimately compel him to learn of the results? Both circumstances appear wholly inconsistent with modern conceptions of bodily autonomy.

On the other hand, autonomy should not be confused with tolerance of risk, or a patient's potential cognitive errors. Though Curry passed a barrage of cardiological examinations and received the support of a diverse group of esteemed cardiologists, he likely internalizes some degree of risk by playing without passage of a DNA exam. Although echocardiograms are highly-accurate, no examination enjoys a foolproof, 100% accuracy rate in detecting HCM, and thus each additional, related-exam provides incremental certainty.

Moreover, because of optimism bias, Curry may be susceptible to under-appreciating the risk of HCM. Indeed, optimism bias posits that individuals assume that general risks do not apply with equal force to

208. See generally, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481 (1995) (discussing the admission of scientific evidence). One exception to courts' general disfavor for required genetic examinations is in obligating prisoners to provide blood samples. Jason Borenstein, *The Death Penalty: Conceptual and Empirical Issues*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 377, 380 (2004).

themselves²⁰⁹ or, more simply, that “good things are more likely than average to happen to us and bad things are less likely than average to happen to us.”²¹⁰ Optimism bias has been documented in other health-related settings. Most famously, smokers are inclined to perceive smoking as significantly less risky for themselves than for other smokers, and they exhibit this inclination without any justification.²¹¹

Nevertheless, Curry’s plausible vulnerability to optimism bias appeared tempered by the explicit and informed advice of independent cardiologists, who did not presumably share the same optimism bias or incentive to see Curry play. Just the opposite, in fact, those cardiologists likely internalized risk-aversion in their dispensing of advice, as fear of liability often encourages physicians and related medical actors to cautiously-advise patients.²¹² This seems especially true in highly-publicized settings such as the one found in this instance.

Third, consider the potential stigma that may arise from a DNA test for a particular purpose, such as affliction of, or propensity to, HCM. How can Curry be certain that unrelated pieces of information, such as afflictions or predispositions to other illnesses, will not be divulged? Certainly, physician-patient confidentiality affords some certainty, but it is neither absolute nor foolproof.²¹³ Moreover, such information may readily fall into the hands of team officials and agents who often do not share the

209. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995) (finding that “as a systematic matter, people are unrealistically optimistic.”); Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1511-12 (1999) (discussing risk perceptions of smokers).

210. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091 (2000) (discussing the phenomenon of “overconfidence bias”).

211. William B. Hansen & C. Kevin Malotte, *Perceived Personal Immunity: The Development of Beliefs about Susceptibility to the Consequences of Smoking*, 15 PREVENTIVE MED. 363, 370-71 (1986); see also Suzanne C. Segerstrom et al., *Optimistic Bias Among Cigarette Smokers*, 23 J. APPLIED SOC. PSYCHOL. 1606, 1614-17 (1993) (noting that individuals may deny that smoking places their health at risk while recognizing that other smokers are placing their health at risk); but see W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 DUKE L.J. 1095, 1113-14 (1998) (presenting evidence that optimism bias is unsupported in the context of cigarette smoking, as research on adolescents fails to identify any significant difference between risks to oneself and one’s peers).

212. See, e.g., Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951, 2010 (1986) (discussing the factors that influence doctors to be risk-averse in their decision making); Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 422-23 (1998) (describing risk-aversion of hospital risk managers in advising physicians on dispensing advice to patients).

213. See e.g., Michael A. McCann, *Message Deleted? Resolving Physician-Patient through Contract Law*, 5 YALE J. L. TECH. 3 (2003) (discussing the impact of email on the physician-patient relationship).

same professional duties of confidentiality.²¹⁴

Importantly, the prospect of inflicting stigma reflects more than a hypothetical concern, given that Curry already experienced its effect while a restricted free agent in the summer of 2005. Despite possessing a remarkable mix of youth, talent, and established results, he failed to attract a competitive offer from any team. Indeed, despite the broad consensus of cardiologists as to the adequacy of Curry's heart, teams appeared to view him as damaged goods.²¹⁵ Thus, if NBA players were forced to undergo DNA tests, teams would likely employ those test results in rendering personnel decisions.

These stigmatic concerns are especially troubling in light of situational inducements and cognitive biases. Just consider how columnists warned NBA teams to avoid signing Curry and obtaining the "*blind hope* associated with his heart condition."²¹⁶ In other words, the mere innuendo of an ailment—even one disputed by the vast majority of physicians who examined a player—can prove strikingly influential.

Along those lines, consider the salience of guilt-by-association tactics. Even though Curry had been examined favorably by a group of cardiologists, we routinely read and heard Curry's name linked with such basketball players as Reggie Lewis (who died from HCM after being told by a group of cardiologists that he should end his basketball career),²¹⁷ Hank Gathers (who died unexpectedly from HCM, without prior examination from cardiologists),²¹⁸ and, later, Jason Collier (who died

214. See generally, Walter T. Champion, *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349 (1997) (discussing the lax regulation of sports agents' professional responsibilities); Jason Gershwin, *Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents*, 5 U. PA. J. LAB. & EMP. L. 585 (2003) (exploring the effects of varying state laws on the rights and duties of sports agents); Ricardo J. Bascuas, Note, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603 (1996) (describing the relationships forged by sports agents with student athletes despite law criminalizing this behavior).

215. E.g., *Larry Brown Makes Debut as General of the Knicks*, THE SPORTS NETWORK, Nov. 2, 2005 (noting that "Curry has a heart issue that made teams reluctant to sign him").

216. Jay Mariotti, *Curry a Big Mystery Bulls Can't Afford*, CHI. SUN-TIMES, Jun. 28, 2005, at 110 (emphasis added).

217. Bulls Deal Curry after DNA Test Refusal, <http://sports.espn.go.com/nba/news/story?id=2180298> (last visited May 8, 2006); see also David DuPree, *Uncertainty, Sorrow Follow Lewis' Death*, USA TODAY, Jul. 29, 1993, at 1C (providing background information on Lewis and HCM). Note that Lewis would also receive a more favorable second opinion, but that opinion was contradicted by the first group of cardiologists. *Id.*

218. Bulls Deal Curry after DNA Test Refusal, *supra* note 217; see also William C. Rhoden, *Deaths of Youthful Athletes Raise Questions over Testing*, N.Y. TIMES, Mar. 14, 1994, at A1 (providing background information on the death of Gathers).

unexpectedly in November 2005 from a heart condition, without prior examination by cardiologists),²¹⁹ without sufficient distinction between Curry's situation and that of those players. Similarly, many observers of Curry employed an unrepresentative sample bias: in the 57-year history of the NBA, which has included thousands of players, only one—Reggie Lewis—died due to HCM, and only one other player—Monty Williams—was known to have it. Of course, such uncommonness proves predictable, as just 0.2 percent of the population has HCM.

As a final point of concern, note the stigmatic disincentive for any player to consent to a required DNA test: Absent approval by the NBPA, a consenting player would likely encounter reproach from other NBA players, as doing so might establish a new contractual precedent for teams and players. More broadly, capitulation to a required DNA test could open a "Pandora's Box" and compel other NBA players and potentially other professional athletes to submit to the medical wishes of NBA teams. In that respect, genetic testing appears especially appropriate for explicit collective-bargaining, and yet NBA executives still feel emboldened to pursue it without such bargaining.

Taken together, perhaps we should not find it surprising that an NBA player represents the first professional athlete petitioned to take a DNA test, that the player skipped college altogether, that the test was designed to detect the presence of an obscure illness, that comparable and less invasive exams had already been passed, and that an NBA team perceived broad public support and moral authority in orchestrating such a requisition. Indeed, the entire Eddy Curry affair appears consistent with the NBA's grander effort to extract players' rights, and to do so while enjoying broad situational support in the face of counter-factual evidence.

V. CONCLUSION

Over the last decade, the NBA has gradually truncated player autonomy under the guise of social authority, the presumption of economic freedom, and the protection of prejudged laws. The rookie wage scale, new dress code, and elevated age-eligibility rule all evidence a blurred transfer of autonomy from player to league, and all are consistent with a situational exploitation of cognitive biases and heuristics. Required DNA testing of NBA players exhibits the most troubling manifestation of this trend, as it severely compromises social norms, ethical safeguards, and, in all probability, legal obligations.

219. Cause of Death Not Immediately Clear, <http://sports.espn.go.com/nba/news/story?id=2192066> (last visited May 8, 2006); see also Howard Beck, *Autopsy Does not Worry Curry*, N.Y. TIMES, Nov. 3, 2005, at D5 (noting factual differences between conditions of Curry and Collier).

From a broader perspective, the NBA's behavior appears emblematic of monopolistic dominion. Monopolies often justify their actions on the grounds that society at-large shares in any benefit that they produce. Similarly, NBA officials' tendency to engage in conclusory statements and stereotypical reasoning evinces the "argument to authority" logical flaw commonly evidenced by monopolistic actors. Indeed, the NBA's primary source of evidence for its paternalistic treatment of players appears to be that, because it believes in the veracity of certain propositions, they are therefore true propositions.

This conclusion begs an obvious question: how can NBA players counter an intensifying trend that enjoys diffuse support and thrives on unappreciated cognitive errors? Though I hesitate to identify a "solution," I encourage a paradigmatic shift in the self-conception of NBA players. Indeed, in the situation around them, NBA players appear vulnerable to a continued diminution of player autonomy. Yet only they can stop its erosion.

A paradigmatic shift requires a normative transformation: Instead of viewing consensus as a relational goal with the NBA, players should regard protection of autonomy as paramount. This may mean conflict with the desire of fans and media for "labor harmony," yet such "harmony" merely reflects a murky mix of simplistic assumptions, cognitive distortions, and stereotypical thinking. In other words, sacrificing harmony and subsequently enduring the wrath of fans and media risks losing only a largely illusory state-of-mind, and one that has facilitated the erosion of player autonomy.

A linguistic evolution appears necessary in this normative transformation. Balderdash commentary describing NBA players as "spoiled brats" in need of "parenting" should be exposed as erroneous and offensive banter: a person's annual income has nothing to do with intrusions upon his or her personal sovereignty and sense of being. Similarly, instead of characterizing a rookie wage scale and an elevated age-eligibility rule as collectively-bargained concessions, or a league-imposed dress code as acceptable oversight, these manifestations should be considered intrusions on player autonomy and unacceptable outcomes in any collectively-bargained relationship.

Along those lines, the NBPA should embrace a broader conception of its negotiating unit, and that conception should place considerable emphasis on the welfare of future NBA players. Although the law may create perverse disincentives for negotiators to disregard their interests, these players are equally, if not more affected by collectively-bargained rules. This aspiration seems particularly meaningful in light of the often harmful and counter-intuitive messages so prevalent in college basketball.

Likewise, the NBPA should forcefully counter the situational

exploitation of cognitive biases. Consider the following possibilities: illuminating how the vast majority of NBA players are sensible, law-abiding citizens, rather than immature and irresponsible “thugs”; promoting opportunities for NBA players to obtain college credit, and highlighting those players who returned to school, rather than allowing a college education to be characterized as a “one-shot” deal; exposing the paternalistic and possibly racist hypocrisy of precluding only 18-year old basketball and football players from employment, while other young athletes or actors, musicians, soldiers, and fast food employees, among others, are deemed sufficiently mature for their occupations; and calling out the NBA for exploiting hip-hop culture for profit while banning players from engaging in that same culture. The list of possible messages could go on for pages.

Even if those messages fell primarily on deaf ears, they would still likely capture a certain percentage of fans and media. Moreover, by inducing an organized response to the NBA, counter-popular messages would appear to engender internal resolve among NBA players. Put more bluntly, the NBPA should turn cognitive errors on their head and reveal how those errors beget erroneous suppositions about NBA players and the league. By doing so, the NBPA would unveil the erosion of player autonomy as real, worsening, and consistent with monopolistic practices. More importantly, such an unveiling would likely change the minds of many NBA observers and encourage a greater collective sense among NBA players.